(20,692.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 300.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PETITIONER,

vs.

J. WILLCOX BROWN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Amended and Supplemental Complaint. 1

In the Circuit Court of the United States

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Equity.

J. WILLCOX BROWN, a citizen of the State of Maryland, who brings this bill for himself as well as on behalf of all other policy-holders and annuitants of the Equitable Life Assurance Society of the United States who may choose to come in and join in this suit, Complainant, 2

versus

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant.

J. WILLCOX BROWN, who is a citizen of the State of Maryland, by leave of Court first had and obtained, brings this his amended and supplemental bill for himself as well as on behalf of all other policy-holders and annuitants of The Equitable Life Assurance Society of the United States who may choose to come in and join in this suit against the said The Equitable Life Assurance Society of the United States, which is a citizen of the State of New York and an inhabitant of the Southern 3

District of New York (hereinafter sometimes called the "Society"), and humbly complaining showeth unto your Honors, on information and belief, as follows:

First.—The Equitable Life Assurance Society of the United States, the defendant herein, was duly incorporated under the laws of the State of New York in May, 1859, under the provisions of the General Act of the Legislature of said State, entitled, "An Act to provide for the Incorporation of Life and Health Insurance Companies, and in relation to agencies of such companies," passed June 24th, 1853, and the amendments thereto, upon compliance by the incorporators of said defendant with said law. A copy of the Declaration of the Incorporators, made and filed in accordance with said law, is hereto attached and made part hereof, marked "Exhibit A."

(*a*). In and by said Declaration and the Charter contained in the same, it is, among other things, provided:

"ARTICLE III.—The capital of said Company "shall be one hundred thousand dollars in cash, "divided into one thousand shares of one hun- "dred dollars each; which shall be personal prop- "erty, transferable only on the books of the Com- "pany, in conformity with its By-Laws. The "holders of the said capital stock may receive a "semi-annual dividend on the stock so held by "them, not to exceed three and one-half per cent. "of the same; such dividends to be paid at the "times and in the manner designated by the Di- "rectors of said Company. The earnings and "receipts of said Company, over and above the "dividends, losses, and expenses, shall be accumu- "lated.

"ARTICLE IV.—The corporate powers of said "Company shall be vested in a Board of Directors,

" and shall be exercised by them, and by such 7
" officers and agents as they may appoint, and
" from time to time empower.

" The Board of Directors shall consist of fifty-
" two persons, a majority of whom shall be citizens
" of the State of New York, each of whom shall
" be a proprietor of at least five shares of the said
" capital stock.

" The Board of Directors may, previous to any
" annual election, and after giving notice at the
" previous meeting of the Board, provide for dimin-
" ishing the number of the directors to not less
" than twenty-four, in which case one-fourth of
" the total number as thus diminished shall be
" elected annually, in the same manner as herein- 8
" after provided in regard to the fifty-two directors
" above named; and the same powers and authority
" shall vest in said Board of Directors thus dimin-
" ished as were previously exercised by the former
" Board of Directors. * * * *

" In the election of Directors every stockholder
" in the Company shall be entitled to one vote for
" every share of stock held by him, and such vote
" may be given in person or by proxy. At any
" time hereafter the Board of Directors, after giv-
" ing notice at the two previous stated meetings,
" may, by a vote of three-fourths of all the Direct- 9
" ors, provide that each life policy-holder, who
" shall be insured in not less than five thousand
" dollars, shall be entitled to one vote at the annual
" election of Directors, but such vote shall be given
" personally, and not by proxy. The Board of
" Directors shall have power to declare, by by-law,
" what number of Directors, not less than seven,
" shall constitute a quorum for the transaction of
" business.,

" ARTICLE V.—After each annual election the
" Board of Directors shall elect annually, from
" among their number, a President, and may, at
" their option, also elect a Vice-President. The

10 "Board of Directors may also appoint at any time a
"President and Vice-President, to act temporarily
"when said officers are absent, interested, or un-
"able to act. The Board shall also appoint a Secre-
"tary, and such other officers as they may deem
"requisite, and who shall hold office during the
"pleasure of the Board of Directors.

"The Directors shall have power to enact by-
"laws, rules and regulations, for the government
"of the officers and agents, and for the manage-
"ment of the affairs of the Company, not incon-
"sistent with this Charter, or with the Constitution
"and laws of this State; and such by-laws, rules,
"and regulations may be amended or repealed by
11 "them at pleasure.

"The directors may determine the rates of pre-
"mium, and the amounts to be insured on any one
"life, and the terms of such insurances, and shall
"have power to purchase, for the benefit of the
"Company, any policies of insurance, dividends, or
"other obligations issued by the Company.

"ARTICLE VI.—The insurance business of the Company shall be conducted upon the mutual plan.

"All premiums shall be payable in cash. In
"case any policy-holder shall omit to pay any pre-
"mium due from him to the Company, or violate
12 "any other condition of the policy of insurance,
"the Board of Directors may forfeit his policy, and
"apply all previous payments to the benefit of the
"Company.

"The officers of the Company, within sixty days
"from the expiration of the first five years from
"December 31, 1859, and within the first sixty
"days of every subsequent period of five years,
"shall cause a balance to be struck of the affairs of
"the Company which shall exhibit its assets and
"liabilities, both present and contingent, and also
"the net surplus, after deducting a sufficient
"amount to cover all outstanding risks and other
"obligations. Each policy-holder shall be credited

" with an equitable share of the said surplus. Such 13
" equitable share, after being ascertained, shall be
" applied to the purchase of an additional amount
" of insurance (payable at death or with the policy
" itself), expressing the reversionary value of such
" equitable share, at such interest as the Directors
" may designate; or if any policy-holder so direct,
" such equitable share of surplus shall be applied
" to the purchase of an annuity, at such rate of
" interest as the Directors shall designate, to be
" applied in the reduction of his or her future
" premiums. In case of death, the amount stand-
" ing to the credit of the party insured at the last
" preceding striking of balance as aforesaid, shall
" be paid over to the person entitled to receive 14
" the same; and the proportion of surplus equitably
" belonging to him or her, at the next subsequent
" striking of balance, shall also be paid, when the
" same shall have been ascertained and declared.

" In case of the death of any party insured prior
" to passing any period for striking of balance as
" aforesaid, the Board of Directors may provide
" what (if any) share of such surplus shall be paid
" to such person.

" The officers of the Company, within the first
" thirty days after the expiration of five years from
" the 31st day of December, 1859, shall cause a
" general balance statement of the affairs of the 15
" Company to be made, which shall be open to the
" inspection of any policy-holder for sixty days, dur-
" ing the usnal hours of business. Said statement
" shall show the amounts received during the pre-
" ceding five years for premiums, interest, and
" annuities, and also the amounts paid during the
" same time for losses, expenses and otherwise,
" and the balance remaining in the treasury,
" together with the manner in which the same is
" invested."

(*b*). The laws of the State of New York relating to Life and Health Insurance Companies were

16 amended by the Legislature of said State in 1872 (Chap. 100, General Laws New York, 1872) as follows:

"Any domestic life insurance corporation may "ascertain at any given time, and from time to "time, the proportion of surplus accruing to each "policy from the date of the last to the date of the "next succeeding premium payment, and may "distribute the proportion found to be equitable "either in cash, in reduction of premium or in "reversionary insurance, payable with the policy, "and upon the same conditions as therein ex-"pressed at the next succeeding date of such pay-
17 "ment, notwithstanding anything in the Charter "of such corporation to the contrary."

Except as herein stated, the said Charter of the defendant is still existing and outstanding, without any further or other modification by the laws of the said State of New York, under which the said defendant society was incorporated, as aforesaid.

(*c*). The Board of Directors of defendant Society has not provided for voting by the policy-holders, as permitted by Article IV above quoted, nor has it diminished the number of its Board from the original number of fifty-two.

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Second.—In addition to your orator and other policy-holders who are financially interested in and protected by the assurance funds held by the defendant Society, there are a class of insurers, called annuitants, with whom the Society has made agreements that in consideration of their paying to the Society fixed sums respectively or in consideration of the surrender of rights under policies upon their lives, the Society will pay to each of such persons fixed sums at stated intervals during the remainder of their respective lives or for some stated period. The sums so paid or contributed by such persons if they were previous policy-holders, or a large portion of the same, have been retained

by the Society and constitute an important part of 19
the assurance funds held to protect policy-holders and provide for other liabilities, and are affected by the facts herein set forth and alleged.

Third.—On December 28th, 1867, your orator made application to The Equitable Life Assurance Society of the United States for a policy upon his life in the sum of twenty-five thousand dollars ($25,000), such policy to be in the form of an ordinary life policy, with the privilege to your orator of changing to a ten-year payment of premium if your orator should elect to do so within three years next succeeding said date. After having being duly ex- 20
amined and accepted as a good risk by the physicians of the said Society, and upon payment of the required premium for the first year to the said Society, your orator received from the said Society a policy of insurance upon his life in the sum of twenty-five thousand dollars ($25,000). Your orator is not able to give a further description of such policy, as he has not a copy thereof, the original policy having been duly surrendered to the Society when your orator received from it the policy next hereinafter referred to in lieu of and in exchange for the said original policy. Thereafter your orator duly paid the premiums upon the said original policy 21
as they came due from time to time until he entered into a different arrangement with the said Society and made with the said Society a new arrangement, whereupon the said Society issued to your orator its policy No. 27175, insuring his life in the sum of twenty-five thousand dollars ($25,000), a copy of which policy is hereto attached and made a part hereof and marked "Exhibit B."

(*a*). As appears by the said policy your orator agreed to pay an annual premium of six hundred and forty-nine dollars and seventy-five cents ($649.75) on December 30th of each year during his life, and the Society agreed, among other things, as follows:

22 "6. This policy, during its continuance, shall be "entitled to participate in the distribution of the "surplus of this Society, by way of increase to the "amount insured, according to such principles and "methods as may from time to time be adopted "by this Society for such distribution; which prin- "ciples and methods are hereby ratified and ac- "cepted by and for every person who shall have or "claim any interest under this contract; but the "Society may at any time before a forfeiture, "upon the request of the person holding the abso- "lute legal title to this policy, substitute a cash "payment to be fixed by said Society, in lieu of the
23 "said increase to the amount insured, and such "payment may be made by reduction of subse- "quent premiums, if said policy-holder shall so "elect."

(*b*). Your orator elected to receive his share of said surplus as ascertained, from time to time, in reduction of the premiums so due by him on the said policy, and the said Society was duly notified of said election and ratified and accepted the same; and since the date of the issuance of such policy your orator has regularly paid the premiums thereon as they severally accrued (the times of payment
24 having been to some extent modified by contract between himself and the said Society), less the sums which at each period the officers of the said Society stated to be the entire amount applicable in reduction of said premiums as your orator's equitable share in said surplus.

Fourth.—Although your orator has been paying said premiums upon the said policy and upon the original policy for which the said policy marked "Exhibit B" was substituted as aforesaid, for a period of thirty-seven years, during at least thirty-two years of which he has been entitled to have his full equitable share of the lawfully ascertained and true surplus profits of the Society applied in reduc-

tion of said premiums, yet the amounts apportioned 25
and allowed by the officers of the said Society in reduction of said premiums as aforesaid, have not been the real amounts of your orator's equitable share in the true surplus. By means of the abuse of discretion, wrongs, inequitable and fraudulent conduct of the said defendant, its officers and agents, hereinafter more fully set forth, the said Society, its officers and stockholders, have wrongfully retained, and to the extent of a large sum fraudulently wasted and misappropriated to themselves as hereinafter set forth, a large portion of your orator's equitable share in said surplus. Your orator has accepted such reductions of premium as have been from time to time assigned to him, solely 26
because of his belief that the officers of the said Society were acting in a just, lawful and honest manner, and in reliance upon the representations of the officers of the Society in relation thereto, that he was receiving his lawful share of the true surplus, which representations were untrue and fraudulent, and without knowledge by your orator that they were untrue, or of the facts which are hereinafter set forth.

(*a*). At the expiration of each year since the Society's incorporation, its Board of Directors have 27
ascertained and entered upon its books a sum alleged to be the "net surplus" earned by the Society during the preceding year as required by its Charter, but annually and not at the expiration of each five years, which surplus was ascertained by causing a balance to be struck from its books of the affairs of the Company, which exhibited its assets and liabilities, both present and contingent, and also the net surplus after deducting a sufficient amount to cover all outstanding risks and other obligations. This surplus so ascertained has been reported annually for many years past to the authorities of the State of New York and the City of New York by the defendant Society as a fund

28 which belonged to the policy-holders exclusively, and one in which the stockholders were without any interest whatever. On the other hand, in its dealings with its policy-holders the said defendant illegally claims that such surplus belongs to its stockholders. It has juggled with the surplus to suit occasion without regard to law or right.

(*b*). Not since its incorporation have the officers of the Society complied with the requirements of the Charter above set forth, that after the said net surplus had been ascertained, they should apply such net surplus in the manner required by the
29 Charter, by crediting each policy-holder with an equitable share of the said surplus, and applying the same or permitting the policy-holder to apply the same in the manner provided by the Charter, or as permitted under the aforesaid amendment of the law passed in 1872.

In entire disregard of the rights of your orator and of the other policy-holders of the Society, and of their duties under the said Charter and the law, and in fraud of the rights of your orator and the other policy-holders of the Society, the officers of the said Society have been crediting and paying to its policy-holders, from time to time, only a portion of this
30 surplus so admitted to exist by the Society, to the whole amount of which your orator and the said policy-holders were entitled in equitable proportion; and contrary to the law and their duty in the premises, and in fraud of the said rights they have neither credited your orator and the other policy-holders each with his or her equitable share of the said surplus as ascertained at the expiration of each five years as required by the Charter, nor at the expiration of each year as permitted by the Law of 1872, although they have each year duly ascertained the same from their books as aforesaid, nor have they paid to the policy-holders, whose policies matured from time to time, their just and equitable share of said surplus, to which they were entitled, but have

retained a large portion of the said surplus in their possession uncredited and undivided; to all of which said surplus the policy-holders, past and present, and your orator, since the time of the issuance of his aforesaid policy have been and are now entitled to either credit or payment in equitable proportion. On the contrary, the stockholders claim and threaten to appropriate said surplus as a dividend or earning upon the shares of stock of said Society, in direct disregard of the aforesaid reports to the New York authorities, and of the rights of your orator and the other policy-holders. 31

The additional amount of the said surplus so withheld and to which your orator is now justly entitled to credit and payment largely exceeds the sum of $2,000, exclusive of interest and costs of this litigation. 32

(c). Your orator herein sets forth a table exhibiting in separate columns the figures taken from the books of the Society in which are entered the said balances which the said defendant at the expiration of each year has caused to be struck and ascertained from its books as aforesaid. In the first column of the said table is given the year to which the said figures are applicable. In the second column is set forth the amount of outstanding assurance in force at the expiration of the year indicated in the first column. In the third column is set forth a statement of all the assets of the said corporation at the expiration of the said period so indicated in the first column. In the fourth and fifth columns, the said total assets are subdivided into parts, the fourth column indicating what part of the assets, according to the said balance so struck by the said Society, should be treated as applicable to the payment of the liabilities, present and contingent, of the said Society, in accordance with the requirements of the Insurance Laws of the State of New York and of the common experience of all well managed in- 33

surance companies. In the fifth column is indicated the portion of the said total assets which the said corporation has set aside as surplus fund not necessary to be kept or reserved for the payment of its liabilities in ordinary course. The amount of the gross assets of the Society apportioned in said fourth column at the close of each year as the estimated amount to cover the assurance fund and other liabilities, if truthfully stated and valued, would be, and always would have been, amply and completely sufficient to meet and defray all liabilities of the said Society, and, if said assurance fund has been truthfully stated and valued, the amount set aside as surplus is and always has been a real surplus and not necessary to be kept or reserved as a provision for the payment of the liabilities of the said Society, present or prospective. The amounts segregated on said books from the other assets and set aside to cover assurance and other liabilities, was made by the officers of the said Society in compliance with and in obedience to the requirements of the Charter and the said Laws of the State of New York, and the said fund so set aside in each year as surplus, is the surplus fund to which the said provisions of the said Charter and Act of 1872 are applicable. The said table so referred to here follows:

Year1. Dec. 3.	Outstanding Assurance.	Assets.	Assurance Fund and Other Liabilities.	Surplus.
1859	$1,144,000	$117,102	$20,948	$96,154
1860	2,641,500	162,618	56,444	106,174
1861	3,670,000	210,636	90,800	119,836
1862	5,500,100	324,013	167,018	156,995
1863	9,260,450	584,714	326,393	258,321
1864	16,564,700	1,125,381	609,570	515,811
1865	27,507,739	1,648,486	1,342,782	305,704
1866	50,764,831	3,077,788	2,716,447	361,341
1867	82,571,120	5,125,423	4,742,760	382,663
1868	112,558,213	7,721,077	7,370,149	350,928
1869	134,223,861	10,510,824	10,191,069	319,755
1870	143,970,984	13,236,025	12,827,591	408,434
1871	154,331,143	16,174,825	15,336,951	837,874
1872	171,443,351	19,695,053	18,466,524	1,228,529
1873	184,282,130	22,972,252	21,422,506	1,549,746
1874	181,029,001	25,981,757	23,978,426	2,003,331
1875	178,632,686	29,039,090	26,436,785	2,602,305
1876	173,050,690	31,734,934	28,297,979	3,436,955
1877	160,821,416	33,530,655	29,425,652	4,105,003
1878	157,737,356	35,454,092	30,711,561	4,742,531
1879	162,357,715	37,366,842	31,816,447	5,550,395
1880	177,597,703	41,108,602	34,150,747	6,957,855
1881	200,679,019	44,308,542	36,831,813	7,476,729
1882	232,829,620	48,025,751	39,947,256	8,078,495
1883	275,160,588	53,030,582	43,914,613	9,115,969
1884	309,409,171	58,161,926	47,678,309	10,483,617
1885	357,338,246	66,553,387	52,691,148	13,862,239
1886	411,779,098	75,510,473	59,154,597	16,355,876
1887	483,029,562	84,378,905	66,274,650	18,104,255
1888	549,216,126	95,042,923	74,248,208	20,794,715
1889	631,016,666	107,150,309	84,329,235	22,821,074
1890	720,662,473	119,243,744	95,503,297	23,740,447
1891	864,894,557	136,198,518	108,405,538	27,792,980
1892	850,962,245	153,060,052	121,870,237	31,189,815
1893	932,532,577	169,056,397	136,689,647	32,366,750
1894	913,556,733	183,544,310	147,564,507	35,979,803
1895	912,509,553	201,009,388	160,385,376	40,624,012
1896	915,102,070	216,773,947	173,496,768	43,277,179
1897	951,165,837	236,876,308	186,333,133	50,543,175
1898	987,157,134	258,369,299	201,058,810	57,310,489
1899	1,054,416,422	280,191,287	219,073,809	61,117,478
1900	1,116,875,047	304,598,063	238,460,893	66,137,170
1901	1,179,276,725	331,039,720	259,910,678	71,129,042
1902	1,292,446,595	359,395,538	284,268,041	75,127,497
1903	1,409,918,742	381,226,036	307,871,898	73,354,138
1904	1,495,542,892	413,953,021	333,158,752	80,794,269

40 (*d*). Your orator avers that not only was it contrary to law for the Society to retain the aforesaid ascertained surplus uncredited and undivided in the manner and form in which it has been retained by them, but also that such retention was not necessary for a prudent management of the Society's affairs, the officers of the Society having ascertained according to their report each year, the entire amount of its liabilities, both present and contingent, and having set aside the reserve fund, as required by law, as well as the fund to cover contingent liabilities for such purposes every year, over and beyond this fund stated to be surplus; and
41 he further avers that such retention has constituted, as against your orator and all other policy-holders of this Society, an unlawful abuse of the discretion vested in the directors of the Society as to the management of its affairs, and a fraud upon his rights and the rights of said policy-holders.

Fifth.—Your orator avers that of the aforesaid surplus, a sum approximating $10,000,000 is held by the Society, in which sum the policy-holders, according to the claims now set up by said Society and its stockholders, despite their aforesaid reports to the authorities of the City and State of New
42 York, have and can have no interest under the rules and regulations for the division of surplus as adopted by the Society's officers for the ascertainment of the equitable shares of the surplus due to each policy-holder, if such rules and regulations are now or ultimately applied to the distribution of the said surplus; and the Society has publicly declared that even if the existing policies had been credited annually with the equitable shares of the surplus to which each was entitled under the rules and regulations adopted by the Society's officers for the distribution of such surplus, there would still remain a sum in the neighborhood of $10,000,000 which could not and would not be so appropriated under such rules and regulations, and your orator

avers that such statements accurately set forth 43
the claims now advanced by the Society, its officers and stockholders, as to said approximate amount of said surplus fund, and also the results to policy-holders of the inequitable rules and regulations adopted by its officers for the distribution of surplus.

(*a*). Heretofore, to wit, on or about the seventh day of April, 1905, one Franklin B. Lord, a stockholder of defendant Society, applied to the New York Supreme Court, Special Term, Second Department, for an injunction to restrain the officers of the Society from procuring certain amendments to its Charter, and publicly claimed that he asserted 44
the stockholders' ownership of and right to the whole of the said above last-mentioned sum of about $10,000,000 of said surplus, which had been so claimed, as aforesaid, by the said Society; and also certain of said stockholders at the hearing upon said application publicly asserted and claimed ownership of and rights as stockholders to about one-half of the said entire surplus of $80,794,269 as against the policy-holders, and publicly asserted that they intended to adhere to and maintain these claims as against the policy-holders; and certain other stockholders have made claim that the whole of said surplus belongs to the stockholders.

The suit of the said Lord is still pending and 45
undetermined.

(*b*). Your orator charges and avers that the retention from the policy-holders of the vast and unnecessary surplus which has been so admittedly accumulated, as aforesaid, has been with the deliberate and fraudulent design and intent to enable the said Society, its officers and stockholders, who have at all times had exclusive charge of making rules and regulations for the said Society, and who have adopted the said rules and regulations which have resulted in producing said surplus, to set up

46 and assert such claims as have been hereinbefore described and stated; and with the further purpose and intent to pile up a great fund under the control of the said Society and its officers and its stockholders, not needed for any legitimate purpose of the Society or the protection of its policy-holders, but by the use of which the said Society, its officers and stockholders, could secure illegal and personal gains, and out of which the said Society, its officers and stockholders, could distribute to and among themselves, under pretence of payment of salaries and expenses, improper and extravagant disbursements, and out of which your orator avers that
47 they have secured such personal gains and have distributed to themselves improper and extravagant salaries, commissions and expenses, as hereinafter set forth and averred, and which belonged to and should have formed part of such surplus; and the said Society, its officers and stockholders, publicly assert their intention to continue the violation of their said Charter obligations and of not crediting and distributing among the policy-holders of the said corporation more than a portion of said surplus fund if they continue in the management of the assurance funds held as aforesaid for the protection of your orator and the other policy-holders.

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Sixth.—On January 1, 1905, the directors of the Society consisted of the following-named persons, fifty (50) in number, to wit:

Louis Fitzgerald, William Wheelock, H. C. Deming, Cornelius N. Bliss, George H. Squire, Charles S. Smith, V. P. Snyder, C. Ledyard Blair, Brayton Ives, M. E. Ingalls, A. J. Cassatt, E. H. Harriman, Jacob H. Schiff, James J. Hill, T. Jefferson Coolidge, John Jacob Astor, Sir William Van Horne, Gage E. Tarbell, Marvin Hughitt, Henry C. Frick, M. Hartley Dodge, John A. Stewart, Alfred G. Vanderbilt, Levi P. Morton, D. O. Mills, Robert T. Lincoln, George J. Gould, John Sloane, George T. Wilson, Thomas T. Eckert, William H. Mc-

Intyre, Samuel M. Inman, H. C. Haarstick, Davit H. Moffat, Joseph T. Low, August Belmont, James B. Forgan, H. Rogers Wintrop, Bradish Johnson and Alvin W. Krech, James W. Alexander, James H. Hyde, Chauncey M. Depew, Thomas D. Jordan, Charles B. Alexander, T. DeWitt Cuyler, H. M. Alexander, F. F. De Navarro, William Alexander and John J. McCook. 49

Of these persons only the following were proprietors of five shares each of the capital stock of defendant Society, being the ten last named, to wit: James W. Alexander, James H. Hyde, Chauncey M. Depew, Thomas D. Jordan, Charles B. Alexander, T. DeWitt Cuyler, H. M. Alexander, F. F. De Navarro, William Alexander and John J. McCook. 50

An illegal attempt had been made to qualify the other named persons as directors by placing in their names five shares each of such stock, the actual proprietorship of which had been retained by the real owners.

(a). Down to the last-named period, so far as outward appearances were concerned, the affairs and business of the Society had been conducted with fidelity to the policy-holders and harmoniously between its officers and directors. On or about the last named date an internal dissension occurred between James W. Alexander, the president of the Society, and other officers thereof, and James H. Hyde, the vice-president of the Society, arising out of a written demand made by the former to the Board of Directors that the policy-holders should be afforded representation in its affairs, which was opposed by said Hyde as the holder of the majority of the capital stock; and immediately, or soon thereafter, the Board of Directors divided and assumed antagonistic positions to each other upon this and other correlative questions. 51

52 Henry B. Hyde, the father of James H. Hyde, had been the reputed founder and organizer of the Equitable Life Assurance Society, and the owner of the majority of its capital stock; and upon his death he left his shares in the Society to his family, the control of the majority of such shares and the use of them being in fact vested in the said James H. Hyde.

(*b*). The result of this contest was that the inside workings and management of the Society were gradually revealed to the policy-holders and to the public. Frequent conferences were held between the two factions, resulting in the adoption, by a
53 majority of the Board, of a proposed amendment of the charter purporting to give to the policy-holders representation in the future management of the affairs of the defendant Society. This plan was submitted to the Superintendent of Insurance of the State of New York, and the State authorities, for confirmation. In the interim, however, Franklin B. Lord, instituted proceedings in behalf of himself and other stockholders for the purpose of preventing the said plan going into effect, and obtained an injunction from the Supreme Court of the State of New York, Second Department, re-
54 straining the adoption of the said plan. In the meantime the true facts as to the negligent, wasteful and fraudulent mismanagement of the affairs of the Society were, as hereinafter referred to, gradually made known and became the subject of general public discussion. It was ascertained, and your orator avers, that the management by the Board of Directors had been committed by the Board to the hands of a few persons, among whom were the following: James W. Alexander, James H. Hyde, Gage E. Tarbell, George T. Wilson, William H. McIntyre, Thomas D. Jordan (all executive officers of the Society as well as directors), W. A. Wheelock, C. M. Depew, V. P. Snyder, H. C. Deming, A. W. Krech, H. C. Frick and Jacob H. Schiff, who

composed the Executive and Finance Committees of 55
the Board, both committees being composed of the same persons excepting as to Jacob H. Schiff who was not a member of the Executive Committee; and it became known, and your orator avers, that many of the directors did not take any active part in and were without any actual knowledge of the workings of the Society.

Upon June 2d, 1905, a committee of the Board of Directors, composed of Henry C. Frick, Chairman, Cornelius N. Bliss, E. H. Harriman, Brayton Ives, and W. E. Ingalls, who had been appointed by such Board on or about April 1, 1905, to "thoroughly investigate and report upon the present management of the Society," made a unanimous 56
report to said Board, which was also given to the public and widely published, and a true copy of which is hereto attached and made part hereof, and marked "Exhibit C," and which report your orator avers to be a true report and one which fully substantiates the allegations as to the conduct of the business and affairs of the defendant herein made.

By direction of the Governor of the State of New York the Superintendent of Insurance of the State of New York made an investigation into the affairs of the defendant Society, and upon June 21, 1905, 57
such Superintendent made a report of such investigation to the said Governor and which report was given to the public and widely published, a true copy of which is hereto annexed and made part thereof, marked "Exhibit D," and which report your orator avers to be a true report and one which also fully substantiates the allegations as to the conduct of the business and affairs of the defendant Society herein made.

(c). As a result of the investigation of the said Committee and of the Superintendent of Insurance of the State of New York, it was discovered and reported by them, and it is alleged by your orator

58 to be the fact, that the Society, its officers and agents, have been guilty of fraud, waste and negligence in the management of the assurance funds held by the said Society, and among many fraudulent and corrupt acts the Society had habitually and knowingly purchased securities from so-called syndicates composed wholly or in part of its own officers and directors, at prices higher than the prices agreed to be paid for said securities by said officers and directors acting through said so-called syndicates. Among said officers and directors to whom said Society so habitually turned over said difference in price of said securities were James W. Alexander, James H. Hyde, George H. Squire, William
59 H. McIntyre, H. C. Deming, Alvin W. Krech and Louis Fitzgerald.

That the Society paid to its officers and directors out of said assurance funds extravagant, unreasonable and excessive salaries and fees, increasing the same from a sum amounting to $297,600 per annum in 1900, to a sum amounting to $448,500 per annum in 1905, without any increase in the value of the services so purported to be paid for; and that the Society, at all the said times, permitted the said officers and directors to whom said sums were paid, under said fraudulent pretense that they were salaries, to themselves control and determine the amount of said salaries;

60 That large sums of money, ranging from $20,000,000 to $37,000,000, belonging to the said assurance funds of the Society, were allowed by it to remain uninvested on deposit in banks and trust companies, without adequate interest, in many of which banks and trust companies the said officers and directors of the Society, or many of them, were large stockholders, for the purpose of securing pecuniary benefit to such officers and directors individually; and such undue and unreasonabe cash balances existed since at least the year 1900;

That large sums of money were recklessly and illegally invested by said Society in securities of

doubtful and insufficient character and value, to 61
the great loss and detriment of the said assurance funds.

(*d*). In consequence of the aforesaid internal dissensions among the directors and officers of the Society, and of the publication of the history of the mismanagement of the Society, the most prominent and well-known directors of defendant began to send in their resignations, and between the second day of June, 1905, and the fifteenth day of July, 1905, the following directors had resigned from the Board: Cornelius N. Bliss, Brayton Ives, E. H. Harriman, M. E. Ingalls, H. C. Frick, George H. Squire, Charles S. Smith, A. J. Cassatt, Jacob H. 62
Schiff, James J. Hill, T. Jefferson Coolidge, John Jacob Astor, Marion Hughitt, M. Hartley Dodge, John A. Stewart, Alfred G. Vanderbilt, August Belmont, D. O. Mills, Robert T. Lincoln, John Sloane, Joseph T. Low and Louis Fitzgerald, and Wm. A. Wheelock had died, leaving vacancies to the number of twenty-five to be filled in a proper legal manner.

(*e*). Prior to the making and publication of the first report of the Superintendent of Insurance of the State of New York, as aforesaid, James H. Hyde, who had possession and control of the major- 63
ity shares of stock as aforesaid of the defendant Society, purported to sell, transfer and deliver five hundred and two (502) of the same, constituting a majority thereof, to one Thomas F. Ryan, of the City of New York. The consideration for said transfer of said 502 shares of said stock of the par value of fifty thousand two hundred dollars [$50,200] purported to be the sum of two million five hundred thousand dollars [$2,500,000,] which it was alleged was paid in bills. The complainant has no knowledge as to whether this reported sale was real and *bona fide*. Soon after the purported sale was alleged to have been made to Ryan, on June 15, 1905, the latter executed an instrument called a Deed of Trust

64 to Grover Cleveland, Morgan J. O'Brien and George Westinghouse, a copy of which is hereto annexed and made part hereof marked "Exhibit E," and under the terms of which the Trustees named therein have undertaken to act and to fill the vacancies in the Board of Directors of the said defendant Society by proposing, as Directors, the names of policy-holders who are not stockholders to the remaining members of the said Board. The said Ryan is now the real managing spirit of said Society and is illegally conducting the said business. The right of these Trustees to select and manage
65 the election of such policy-holders as members of the Board of Directors at the present time, or to attempt to qualify such character of directors at the annual meeting, as provided by the said Deed of Trust, is denied by your orator. Twenty policy-holders, who are not stockholders, have been so proposed by such trustees, and have been elected by said remaining members of said Board as Directors and are serving thereon, but that such election was lawful is denied by your orator, and by minority stockholders of the Society, and until such questions are settled by the determination of a court of final jurisdiction there does and will exist absolute confusion and corporate anarchy in the management of the affairs of the Society.

66 (*f*). Your orator further alleges and complains in this connection that for a long time previous to the date of filing this amended bill all the dealings and sales in the shares of the defendant Society have been based upon the illegal, false and fraudulent assumption that the stockholders of the Society were entitled to all, or a large proportion, of the accumulated surplus. Although the dealings in the shares were infrequent, it was assumed by the sellers and purchasers of such shares that not only the majority holding of shares of the defendant Society, but also all the individual shares were of enormous value; and that, in addition to giving the holder

of a majority of such shares the absolute control of 67
the Society and its great property, the shareholders would eventually receive millions of dollars as dividends from the said wrongfully accumulated and undivided surplus which would eventually be distributed amongst them, and not among the policy-holders.

(*g*). Your orator further alleges and complains in the same connection that he and the other policy-holders and annuitants are without any adequate remedy at law to secure proper protection and care of the said assurance funds and surplus now under the control of the said Society, or to recoup them- 68
selves for the aforesaid fraudulent and illegal acts of the directors of the Society; that the controlling shares of the said Society have been held in the past by Henry B. Hyde, and of latter years by James H. Hyde, for their own personal purposes and uses; and that in the alleged and purported purchase of the majority of said shares by said Thomas F. Ryan, the latter has acquired the same and now holds them as a monopoly, giving him the control, direct or indirect, of the management of the corporation and of its property and affairs, and without same being practically affected in any way by said Trust Deed, which your orator avers to 69
be void, unenforceable in law and revocable; and that in theory and principle the said Ryan asserts that the majority shares control the policy of the company and its property, subjecting the latter to the same dangerous uses and misuses as against the interests of the present policy-holders and annuitants, as have prevailed heretofore as a consequence of such majority control of said stock.

Seventh.—The business carried on by the defendant Society has become, and is, of great magnitude, and the annual expense of conducting the same, exclusive of amounts paid to policy-holders, beneficiaries of policies and annuitants, now amounts,

70 and has for some years past amounted, to a sum averaging more than one million dollars ($1,000,000) per month.

A very large portion of such disbursements of the defendant Society, to wit, more than seventy-five per cent. (75%) thereof, has been, and is, expended for the purpose of obtaining new business. The other expenses of the defendant's business, including taxes, constitute less than twenty-five per cent. (25%) of the total expenditures of the defendant Society.

(*a*). The assurance funds held by the Society have
71 been fraudulently and negligently, and are being, wasted and mismanaged and lost to the extent of many millions of dollars; it is without a legally chosen Board of Directors and the real value of the property held by it is unknown and speculative. Said facts are matters of general public knowledge. The consequence has been, and is now, that the acquisition of new business by the Society is at a practical standstill, and the business of the Society is being conducted at a large loss to the present policy-holders; and the further conduct of said business threatens irretrievable loss to the annuitants, as well as to the policy-holders.

72 (*b*). The public distrust of the defendant Society and its management has been largely augmented by the knowledge recently disclosed, and which is averred to be the fact, that the affairs of the Society have been controlled in the past continuously, and are still controlled, by a series of single individuals, who have in turn been each the proprietors of more than a majority of the capital stock of the defendant Society, which majority stock holding from time to time has been used, as aforesaid, for the manipulation of the said assurance funds and so-called surplus for the personal gain,

benefit and aggrandizement of the party holding 73
such majority stock.

(*c*). If truthfully stated and prudently valued and conserved, the said property and assurance funds and so-called "surplus," together with the funds to be realized from the continuing agreements of the present policy holders to pay the future premiums to become due upon their policies, are sufficient to provide for and liquidate every outstanding policy of the defendant Society, even if all such policies remain in force; and such funds are sufficient to meet all sums due or to become due upon all outstanding policies, whether cancelled, surrendered or matured; and the funds in the hands of 74
the Society received from annuitants and set aside for this purpose are sufficient to ensure the performance of every contract made with such annuitants.

(*d*). With full knowledge of the foregoing facts as to the present condition of its business, and despite the general and widespread public distrust of the defendant Society, it is now attempting to, and threatens and intends to, persist in efforts to procure new insurance business, and to that end threatens and intends to continue making enormous 75
disbursements at the expense and out of the said assurance funds and socalled surplus.

There is no reasonable probability that such efforts will be successful, and meanwhile the Society is without funds of its own with which to defray said expense of attempting to continue its said efforts to obtain new business.

If the said Society should eventually, after the course of a long period of time, succeed in obtaining any substantial amount of new business, the premiums to be received from future policy-holders, and payments from future annuitants can in no wise benefit the present policy-holders and an-

76 nuitants, and the said enormous expenditure involved in obtaining such new business would dangerously deplete and diminish the said present assurance fund and so-called "surplus" which now belong to and are held solely for the benefit of the present policy-holders and annuitants, and which, if truthfully stated, valued and conserved, are now adequate to satisfy the claims of the said present policy-holders and annuitants, if not so depleted.

Your orator avers that there is no good or just reason why the said defendant Society should so continue its efforts to obtain new business at the expense of the present policy-holders and an-
77 nuitants; there is no reason why any effort should be made, so far as the interests of the present policy-holders and annuitants are concerned, to obtain any new business for the defendant Society; the effort to obtain new policy-holders would be a positive and distinct disadvantage and loss to the present policy-holders and annuitants; the plan to continue further the said enormous expenditures of the defendant in endeavoring to obtain such new business at the expense of the present policy-holders and annuitants is unreasonable and inequitable as to them, and should not be conducted at
78 their risk under the present circumstances, and especially in view of the past waste, misconduct and mismanagement of the said assurance funds by defendant Society, to which waste, misconduct and mismanagement are solely due the present condition of the business of the defendant.

Eighth.—Your orator avers that the principal purpose and object intended to be attained under the charter of the defendant Society, and the law in force at the time of its incorporation, was the assuring and securing of an honest, equitable and economical administration of the funds committed to its charge by policy-holders and annuitants through the medium of a directorate composed of

stock proprietors, limited in profits to dividends upon their stock of seven per cent. (7%) annually. In consequence of the immense unanticipated growth of the business and assurance funds of the Society, such purpose and object have been demonstrated to be and have become, impracticable. By said method it is impossible to subserve or faithfully effectuate said original purposes in the manner contemplated by the said charter through a stock corporation with a small capital, exercising absolute uncontrolled power over such assurance funds. The capital is grossly inadequate for the enormous business transacted by the Society. The original purpose, intent and object of the incorporation of the defendant Society, as above stated, has failed. The temptation to those so vested with control of these enormous funds to augment their lawful profits by other and illegal profits at the expense of the funds committed to their charge has proven to be overpowering. These facts, and the disastrous consequences thereof in destroying the confidence in the defendant Society, and in the business so heretofore conducted by it have been recognized by the defendant and its stockholders; and it has been made publicly known by it that, in order to continue its business, and to procure new insurance business, the defendant intends to experiment in novel and untried methods of management and control. Litigation, in which the feasibility of said methods will be drawn in question, is now threatened, and the Society is without funds with which to defray the enormous expense of conducting such experiments, unless it makes use of said insurance funds and so-called surplus, the property of the policy-holders and annuitants.

79 80 81

Ninth.—Under the charter of the said defendant Society, a copy of which is hereto annexed as an exhibit, it is provided that the Board of Directors shall consist of fifty-two persons (unless otherwise provided by said Board, which has not been done)

82 a majority of whom shall be citizens of the State of New York, each of whom shall be the proprietor of at least five shares of said capital stock. For many years past a large majority of the fifty-two directors of the said Society have not been proprietors of at least five shares of its capital stock, and at the present time there are not over twelve members of said Board who are proprietors of five shares of said stock, and also at the present time there are not fifty-two persons a majority of whom are citizens of the State of New York who are proprietors of at least five shares of the stock of the defendant Society, and your orator avers that it is impossible for the defendant to elect a Board of Directors to law-
83 fully execute the trust imposed upon the Society by its charter, and that the defendant is now incapacitated from further conducting its business according to law.

(*a*). Said incapacity to lawfully continue to exercise the corporate functions of the said defendant has been brought about by the accumulation of stock in the hands of one stockholder who had acquired the same for the purpose of corruptly and dishonestly wasting and appropriating to himself and his successors the said assurance funds. Said
84 concentration of ownership, which has rendered it possible in the past to commit the acts hereinbefore complained of, still continues and exposes the said assurance funds of the Society to the same character of waste and mismanagement.

Tenth.—As heretofore averred, the said defendant Society, for many years past, has wilfully and negligently failed to properly invest and reinvest the said assurance funds held for the protection of your orator and other policy-holders and annuitants; has continuously and wilfully paid wrongful and extravagant sums out of said funds to its officers and agents; has wilfully and negligently and fraudulently mismanaged, and through its officers

and agents, misappropriated the said assurance funds, and by reason of such waste, extravagance, mismanagement and misappropriation has largely depleted the same. Your orator has no means of knowing the precise amounts of such wastes and misappropriations, and he therefore prays for an accounting that the amount thereof may be properly ascertained, and that a decree may be entered herein directing the said defendant Society to repay and refund to the said assurance funds, for the benefit of your orator and the other policy-holders and annuitants, the said amounts so wasted and misappropriated when ascertained, with the interest thereon from the dates when the same were so wasted and misappropriated. 85 86

The said defendant is wholly unable to repay the amount of such wasted and misappropriated moneys to said fund for the benefit of your orator and the other policy-holders and annuitants, and your orator avers that the said defendant is wholly insolvent in consequence thereof.

Eleventh.—Your orator avers that the policy-holders and annuitants of the said Society number above 500,000, residing in practically all States of the Union, and all parts of the world; that the beneficiaries, direct and indirect of the policies, number in the millions, and that the business of the Society is one of public use and public concern. Your orator further avers that suits seeking to remedy the present condition of affairs in the defendant Society have already been instituted in other jurisdictions by other policy-holders, and that many other such suits are threatened; that in an action at law brought by individual policy-holders there can by no possibility be proper crediting or apportioning of said assurance fund or of said surplus; that if each policy-holder is remitted to his own remedy either at law or in equity, there will be a multiplicity of suits; that it will be impossible in a great number of different suits at law to 87

88 determine what amount is to be distributed and to what proportion each policy-holder is entitled; that in such numerous suits at law, if they should be instituted, it would be impossible to ascertain the proportion of the credits of each individual policy-holder, who might sue, to the whole fund, and the rights of your orator and of other policy-holders would by such proceedings, if the policy-holders should be relegated thereto, be seriously and irreparably damaged.

Twelfth.—That the defendant has in its possession books, papers, records and documents showing
89 fully all the facts in this Bill stated, details of which are not known to your orator and without a discovery of which your orator cannot fully prove the facts upon which right to his relief depends.

Thirteenth.—Your orator further avers that the general rules and regulations which have been adopted and acted on by the officers of the society with reference to the crediting and disposition of the "net surplus," as ascertained by them from time to time are inconsistent with the Charter and contrary to the Laws of the State of New York.

90 *Fourteenth.*—Your orator, further complaining, shows that the capital of the defendant paid in is only $100,000. That the said Society is responsible in law and equity to the policy-holders for excessive sums paid in the way of salaries and fees, and also for all sums of money and damages consequent upon fraud, waste, neglect or wilful mismanagement of the property and affairs of the Society. That these sums amount at the present time to many hundred thousands of dollars in excess of the capital of $100,000, and as to which your orator and the other policy-holders are entitled to an accounting, and the Society has no funds with which to meet these enormous losses, but is insolvent. The property of the defendant is now in the hands or under the

control of the stockholders, whose representatives have been guilty of misappropriation, waste, fraud and neglect in the management of its affairs and property. The business and affairs of the Society are at a standstill; its morale as an insurer is destroyed; whatever business it may do will be at an enormous loss and sacrifice on the part of the present policy-holders. Their supreme interest is to place the assets in the hands of competent receivers, appointed by this Court, and to gradually, prudently and economically wind up the affairs of the Company. In this way only can the policy-holders and annuitants be protected from eventual and irretrievable loss. 91

Fifteenth.—Your orator further avers that the matter in dispute exceeds the sum of two thousand dollars ($2,000), exclusive of interest and costs; that the wrongs heretofore recited, which have been suffered by and inflicted upon himself and the other policy-holders, and which are now threatened and impending over them as aforesaid, cannot be remedied except by the taking of the whole of said assurance funds and the said surplus fund and the fund representing the original capital out of the possession of the defendant Society into the possession of the Court, and a discovery of the books, papers, records and documents and an accounting of the affairs of the Society had in accordance with equitable principles as administered by a Court of Chancery, in order to ascertain the amount due to said assurance fund by the Society by reason of its aforesaid waste, mismanagement and misappropriation and the exact amount of such "surplus" belonging to the policy-holders as aforesaid, and then an equitable crediting of the same to each policy-holder, or the representatives of past policy-holders in just proportion, and a disposition of such credits as shall be just and equitable by the Court; and also the ascertainment of the equitable proportion of said assurance fund belonging to 92 93

94 each policy-holder and annuitant, and a just and proper disposition of the same.

Sixteenth.—Your orator and all other policy-holders and annuitants of the defendant Society are without adequate remedy at law in the premises, and are threatened with irreparable injury by the facts hereinbefore complained of, and are entitled in equity to have the entire property and funds of the defendant Society taken into the custody of the Court by a receiver or receivers to be appointed by the Court, to hold the same and distribute and appropriate it under the directions of the Court.

95 Wherefore, your orator is entitled to relief, and on behalf of himself and the other policy-holders and annuitants of the said defendant Society, prays equitable relief as follows:

First.—That the defendant Society produce and make discovery of all books, papers, records or documents in its possession, or under its control, or that of its officers or agents, relating to the matters aforesaid, and deposit the same in the office of the clerk for the usual purposes.

96 *Second.*—That an accounting be had and taken, under the direction of the Court, of all dealings and transactions of the defendant Society, its officers, agents and stockholders, in and about said surplus and assurance funds, from the commencement of the business of the Society, or for such other period as the Court deems proper.

Third.—That a trust be adjudged and declared to exist, and be imposed upon the said assurance funds and surplus as ascertained, and as alleged in the foregoing bill, in favor of the policy-holders, past and present, of such Society, and against the said Society, its officers and stockholders, and that

it be adjudged that they and each of them hold the same as trustees for such persons as shall be declared to have interests therein under the decree to be entered in this cause. 97

Fourth.—That it be adjudged that your orator and the policy-holders and annuitants of the defendant Society, and all former policy-holders or their representatives, who may be entitled thereto, be credited with the full, proper and equitable share of the said surplus and assurance funds as properly ascertained upon said accounting, and that such amounts thereof as may be found to be due and payable be adjudged to be paid forthwith.

Fifth.—That an accounting be had and taken, under the direction of the Court, of all dealings and transactions of the defendant Society, its officers, agents and stockholders, in and about the funds received and held by the Society, realized from the premiums paid by policy-holders and annuitants, and the accretions thereof, and that on the taking of said account it be ascertained to what extent the said defendant Society is indebted to the said fund so derived as aforesaid, on account of damages, losses and depletions occasioned by its negligence, misconduct, misappropiations and other causes averred in the said Bill and this Amended Bill. 98

Sixth.—That it be adjudged that the defendant Society pay into the said assurance fund the amount ascertained on said accounting to be due from the said defendant Society to the said fund. 99

Seventh.—That the defendant Society, its directors, officers, and agents, pending this suit and forever thereafter, be enjoined from further retaining or controlling or expending in any way the said funds received from the policy-holders and annuitants, and the accretions thereof, and constituting the assurance funds and so-called surplus of the

100 Society, or with the funds and investments representing the original capital of the Society, or from doing any other act or thing in connection with the same, except to transfer the same to a receiver or receivers to be appointed by this Court.

Eighth.—That a receiver or receivers be appointed by this Court to take possession of all the funds, assets and property held by the defendant Society of every character and description, and administer the same as they may be directed by the Court.

Ninth.—That your orator have such other, further or different relief as may in the premises or
101 in the further progress of this suit appear to be just and equitable.

DOS PASSOS BROS.,
BATTLE & MARSHALL,
JOSEPH DE F. JUNKIN,
Solicitors for Complainant.

STATE OF
County of } ss.:

102 J. WILLCOX BROWN, being duly sworn, deposes and says: That he is the complainant in the above entitled suit and has read the foregoing amended and supplemental bill of complaint; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me this
day of , 1905. }

Exhibit A.

103

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

DECLARATION.

We, the undersigned, do hereby declare and express our intentions to associate and form an incorporated company, for the purpose of making insurance upon the lives of individuals, and every insurance appertaining thereto or connected therewith; and to grant, purchase or dispose of annuities, pursuant to the provisions of the act entitled, "An Act to provide for the incorporation of life and health insurance companies, and in relation 104
to agencies of such companies, passed June 24, 1853," and amendments thereto. And the subscribers do further declare that the following is a copy of the Charter proposed to be by them adopted:

CHARTER.

ARTICLE I.—This corporation shall be called and named "The Equitable Life Assurance Society of the United States." The principal office for the transaction of business shall be located in the City of New York.

ARTICLE II.—The business of this Company shall 105
be to make insurance upon the lives of individuals, and every insurance appertaining thereto or connected therewith; and to grant, purchase or dispose of annuities, as set forth in the act aforesaid, passed June 24, 1853, and amendments thereto. And this Company shall possess and enjoy all the powers, privileges and franchises granted to, and shall be subject to all the regulations, restrictions and obligations imposed upon incorporations, organized and existing under the said act of the Legislature of the State of New York, passed June 24, 1853, and any amendments thereof.

106 ARTICLE III.—The capital of said Company shall be one hundred thousand dollars in cash, divided into one thousand shares, of one hundred dollars each, which shall be personal property, transferable only on the books of the Company in conformity with its By-laws. The holders of the said capital stock may receive a semi-annual dividend on the stock so held by them, not to exceed three and one-half per cent. of the same; such dividends to be paid at the times, and in the manner designated by the directors of said Company. *The earnings and receipts of said Company, over and above the dividends, losses and expenses, shall be accumulated.*

107 ARTICLE IV.—The corporate powers of said Company shall be vested in a Board of Directors, and shall be exercised by them, and by such officers and agents as they may appoint, and from time to time empower.

The Board of Directors shall consist of fifty-two persons, a majority of whom shall be citizens of the State of New York, each of whom shall be a proprietor of at least five shares of the said capital stock.

The Board of Directors may, previous to any annual election, and after giving notice at the previous meeting of the Board, provide for diminishing the number of the directors to not less than twenty-four, in which case one-fourth of the total number as thus diminished shall be elected annually, in the same manner as hereinafter provided in regard to the fifty-two directors above named; and the same powers and authority shall vest in said Board of Directors thus diminished as were previously exercised by the former Board of Directors.

108

The following named persons shall constitute the first Board of Directors, who shall hold office until their successors are appointed: William C. Alexander, William Walker, Henry Young, Irad Hawley, James Low, James M. Beebe, Henry A. Hurlbut,

Thomas A. Biddle, Benjamin E. Bates, John T. 109
Moore, Thomas U. Smith, William Whitewright, Jr., William G. Lambert, Wilmot Williams, Peter McMartin, George H. Stuart, James Lenox Kennedy, John Slade, Henry J. Gardner, Henry H. Hyde, E. Spencer Miller, Solomon R. Spaulding, Dudley S. Gregory, Stephen H. Phillips, John Auchincloss, James M. Halsted, Henry S. Terbell, Thomas S. Young, Bennington F. Randolph, Waymen Crow, Geo. Talbot Olyphant, Alexander Young, Samuel Frothingham, Jr., Thomas A. Cummins, Francis B. Cooley, H. D. Newcomb, Henry G. Marquand, Moses A. Hoppock, George D. Morgan, H. V. Butler, Ezra C. Read, Dwight Townsend, Henry M. Alexander, William T. Blod- 110
gett, Benjamin F. Manierre, E. J. Hawley, Alanson Trask, Edward M. Lambert, Daniel D. Lord, Robert Bliss, Henry Day, Henry B. Hyde.

In case either or any of the above-named persons shall decline to serve or prove to be ineligible, the vacancy or vacancies may be filled by the remaining Directors.

The first Board of Directors shall, immediately after the organization of the Company, divide themselves by lot into four classes of thirteen each. The term of the first class shall expire at the end of one year from December 31, 1859; that of the sec- 111
ond, at the end of two years from that time; that of the third, at the end of three years from that time; and that of the fourth class, at the end of four years from that time, and so on, successively in each and every subsequent year.

One-fourth of the Board of Directors shall hereafter be elected annually, as provided in the following section, and shall hold office for four years, or until their successors are chosen; but any director shall be re-eligible for election. Vacancies occurring in the intervals of election, by death or resignation, may be filled by the Board in the manner set forth in the By-Laws.

112 The annual election of Directors shall be held on the first Wednesday in the month of December, at the principal office of the Company, in the City of New York, and of which fourteen days' previous notice shall be given in two of the daily papers of said City. The Directors shall be chosen by ballot, and a plurality of votes shall elect. The Board of Directors shall appoint three inspectors of election, who shall be life policy holders in the Company; and the President may supply any vacancy occasioned by the omission of any inspector to serve. In case of failure to elect on that day, the remain-
113 ing Directors, whose terms of office do not then expire, shall have power to fill the said vacancies.

In the election of Directors every stockholder in the Company shall be entitled to one vote for every share of stock held by him, and such vote may be given in person or by proxy. At any time hereafter the Board of Directors, after giving notice at the two previous stated meetings, may, by a vote of three-fourths of all the Directors, provide that each life policy-holder, who shall be insured in not less than five thousand dollars, shall be entitled to one vote at the annual election of Directors, but such vote shall be given personally, and not by
114 proxy. The Board of Directors shall have power to declare, by by-law, what number of Directors, not less than seven, shall constitute a quorum for the transaction of business.

ARTICLE V.—After each annual election the Board of Directors shall elect annually, from among their number, a President, and may, at their option, also elect a Vice-President. The Board of Directors may also appoint at any time a President and Vice-President to act temporarily when said officers are absent, interested or unable to act. The Board shall also appoint a Secretary and such other officers as they may deem requisite, and who shall hold office during the pleasure of the Board of Directors.

The Directors shall have power to enact by-laws, 115
rules and regulations for the government of the officers and agents, and for the management of the affairs of the Company, not inconsistent with this charter, or with the constitution and laws of this State; and such by-laws, rules and regulations may be amended or repealed by them at pleasure.

The directors may determine the rates of premium, and the amounts to be insured on any one life, and the terms of such insurances, and shall have power to purchase, for the benefit of the Company, any policies of insurance, dividends, or other obligations issued by the Company.

ARTICLE VI.—The insurance business of the Com- 116
pany shall be conducted upon the mutual plan.

All premiums shall be payable in cash. In case any policy holder shall omit to pay any premium due from him to the Company, or violate any other condition of the policy of insurance, the Board of Directors may forfeit his policy, and apply all previous payments to the benefit of the Company.

The officers of the Company, within sixty days from the expiration of the first five years, from December 31, 1859, and within the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the 117
Company, which shall exhibit its assets and liabilities, both present and contingent, and also the net surplus, after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policy holder shall be credited with an equitable share of the said surplus. Such equitable share, after being ascertained, shall be applied to the purchase of an additional amount of insurance (payable at death, or with the policy itself), expressing the reversionary value of such equitable share, at such interest as the directors may designate, or if any policy-holder so direct, such equitable share of surplus shall be applied to the purchase of annuity, at such rate of interest as the directors shall

118 designate, to be applied in the reduction of his or her future premiums. In case of death, the amount standing to the credit of the party insured, at the last preceding striking of balance as aforesaid, shall be paid over to the person entitled to receive the same; and the proportion of surplus equitably belonging to him or her, at the next subsequent striking of balance, shall also be paid, when the same shall have been ascertained and declared.

In case of the death of any party insured prior to passing any period for striking of balance, as aforesaid, the Board of Directors may provide what (if any) share of such surplus shall be paid to such person.

119 The officers of the Company, within the first thirty days after the expiration of five years, from the 31st day of December, 1859, shall cause a general balance statement of the affairs of the Company to be made, which shall be open to the inspection of any policy-holder for sixty days during the usual hours of business. Said statement shall show the amounts received during the preceding five years for premiums, interest and annuities, and also the amounts paid during the same time for losses, expenses and otherwise, and the balance re-
120 maining in the treasury, together with the manner in which the same is invested.

ARTICLE VII.—The fiscal year of the Company shall commence on the first day of January, and terminate on the thirty-first day of December, in each year.

ARTICLE VIII.—William Walker, Henry A. Hurlbut, James Low, Thos. A. Cummins, Peter McMartin and Henry G. Marquand shall be commissioners to open books for subscription to the capital stock, at such times and places as shall be proper, and to keep the same open until the said sum of one hundred thousand dollars shall be subscribed in full.

IN WITNESS WHEREOF we, the subscribing cor-

porators, have hereunto subscribed our names this second day of May, one thousand eight hundred and fifty-nine. 121

William C. Alexander,	Henry M. Alexander,
Wm. Walker,	John Auchincloss,
Henry A. Hurlbut,	John Slade,
Henry G. Marquand,	P. McMartin,
Daniel D. Lord,	W. Whitewright, Jr.,
Thomas A. Cummins,	Geo. D. Morgan,
Thos. U. Smith,	E. Spencer Miller,
Henry Day,	Geo. H. Stuart,
Moses A. Hoppock,	Benj. E. Bates,
Wm. G. Lambert,	Alanson Trask,
H. S. Terbell,	Thos. A. Biddle, 122
J. M. Halsted,	T. S. Young,
Henry B. Hyde,	Jas. M. Beebe,
Robert Bliss,	S. Frothingham, Jr.,
Edward W. Lambert,	Henry J. Gardner,
James Low,	Stephen H. Phillips,
Dwight Townsend,	S. R. Spaulding,
H. V. Butler,	Henry H. Hyde,
Geo. Talbot Olyphant,	Bennington F. Randolph,
Wilmot Williams,	John T. Moore,
E. J. Hawley,	Henry Young,
Benj. F. Manierre,	D. S. Gregory,
William T. Blodgett,	Irad Hawley.

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124 **"Exhibit B."**

THE
EQUITABLE
LIFE ASSURANCE SOCIETY.

Premium.	Amount.
$649.75/100	$25,000

OF THE UNITED STATES.

Age 34. No. 27,175

120 Broadway, New York.

Vice-President,	President,
125 JAMES W. ALEXANDER.	HENRY B. HYDE.
Actuary,	Assistant Secretary,
GEORGE W. PHILLIPS.	WILLIAM ALEXANDER.

Secretary,
SAMUEL BORROWE.

IN CONSIDERATION OF THE APPLICATION FOR THIS POLICY OF INSURANCE, which is hereby referred to and made a part of this contract, and of each of the statements made therein, which, whether written by his or her own hand or not, every person accepting or acquiring any interest in this contract hereby
126 adopts as his or her own, and warrants to be full and true, and to be the only statements upon which this contract is made;

And in further consideration of the payment of the sum of fifty-eight hundred and forty-seven dollars and seventy-five cents, at the Home Office of the Society at the date hereof, the receipt whereof is hereby acknowledged, and of the annual payment of six hundred and forty-nine dollars and seventy-five cents, to be made at the said office on or before the thirtieth day of December in every year, during the continuance of this contract:

Does promise to pay to Turner M. Brown, wife of J. Willcox Brown, for her sole use, if living, in

conformity with the Statute, and, if not living, to 127
the children of said J. Willcox Brown or their guardian, for their use, or if there be no such children surviving, then to the executors, administrators, or assigns, of said J. Willcox Brown the sum of twenty-five thousand dollars (any indebtedness to the Society on account of this contract to be first deducted therefrom), at the office of the Society, in the City of New York, within sixty days after notice and the proofs hereinafter required of the death of said J. Willcox Brown, of Petersburg, in the County of Dinwiddie, State of Virginia, shall have been furnished to the Society at its said office;

AND the said Society does hereby further PROMISE AND AGREE that if, after premiums upon this Policy 128
for not less than three complete years of assurance have been duly received by said Society, this Policy should cease in consequence of default in payment of a subsequent premium, said Society will issue, in lieu of such Policy, a new paid-up Policy, in favor of said Turner M. Brown, if living, and, if not living, to the children of said J. Willcox Brown, or their guardian, for their use, or if there be no children surviving, then to the executors, administrators, or assigns of said J. Willcox Brown, for an amount, calculated in accordance with the table then used by said Society for such purpose; provided always that before such default shall have 129
occurred this Policy be surrendered, duly receipted, with a request in writing for the change, duly signed by such person.

THIS POLICY is issued and accepted upon the condition that the provisions and requirements, printed or written by the Society, upon the back of this Policy are accepted as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

IN WITNESS WHEREOF, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES has caused this Policy to be signed by its President and Secretary, at the office in the City of New York,

130 the twelfth day of January, A. D. one thousand eight hundred and seventy-six.

Examined by
W. ALEXANDER, Ass't Secretary.
G. W. PHILLIPS, Act'g President.

No person except the President, Vice-President, Actuary, Secretary or Assistant Secretary is authorized to make, alter, or discharge Contracts, or waive Forfeitures.

FOR A WIFE.
G. 75, No. 2.

131 PROVISIONS AND REQUIREMENTS REFERRED TO IN THIS POLICY.

1. If any statement made in the application for this Policy be in any respect untrue, the consideration of this contract shall be deemed to have failed, and the Society shall be without liability under it.

2. All premiums are due in the City of New York, at the date named in the Policy, but at the pleasure of the Society suitable persons may be authorized to receive such payments at other places,
132 but only on the production of the Society's receipt therefor, signed by the President, Vice President, Actuary, Secretary, or Assistant Secretary, and countersigned by the person to whom the payment is made. No payment made to any person except in exchange for such receipt, will be recognized by the Society. All premiums are considered payable annually in advance. When the premium is made payable in semi-annual or quarterly installments, that part of the year's premium, if any, which remains unpaid at the maturity of this contract, shall be regarded as an indebtedness to the Society on account of this contract, and shall be deducted from the amount of the claim; and if any premium,

or installment of a premium, on this Policy shall 133
not be paid when due, the consideration of this contract shall be deemed to have failed, and the Society shall be released from liability; and no credit for surplus accumulated upon this Policy shall be deemed applicable to the payment of any premium.

3. If the said person, upon whose death this Policy matures, shall die in consequence of a duel, or of the violation of law, or by intoxication,.....

.....

.....

or if, without the written consent of the Society, signed by the President, Vice-President, Actuary, 134
Secretary or Assistant Secretary thereof, he shall pass or remain beyond the limits of residence and travel allowed by this Policy, or shall personally engage in any of the occupations or employments which are hereinafter specified, the Society shall be released from all liability on account of this contract. The limits of travel and residence allowed under this contract include those parts of the settled limits of the United States and British possessions which lie between the parallels of 50° and 36° 30′ north latitude; also that part of Tennessee which lies east of the Tennessee River; also those 135
parts of Alabama, Georgia, South Carolina and North Carolina which lie north of the parallel of 34° north latitude, and at the same time more than 100 miles from the Atlantic coast; also all the places within fifty miles of Atlanta, Georgia; also the settled limits of the United States which lie between the 100th and 109th degree west longitude, and at the same time north of the parallel 32° north latitude; also all the settled limits of the United States which lie west of the 109th meridian of west longitude, except Alaska and Arizona; also those parts of Europe which lie north of the 42d parallel of north latitude. Also, before July 1st, and after November 1st, in any calendar year, those part of the

136 settled limits of the United States which lie south of the parallel 36° 30′ north latitude. Travel is permitted in first class vessels by direct route along the coast of the United States and the British North American Possessions, and between Europe and said British Possessions and the United States, provided no port is entered not included at the time in the limits above allowed for travel and residence. *But* travel and residence of the person at whose death this contract matures, *beyond* the above limits, or at *other* seasons than are above stated, will release the Society from all liability under this contract. The
137 occupations and employments, engagement in which will release the Society from all liability under this contract, are: blasting, mining, submarine labor, aeronautic travel and excursions, the manufacture, handling or transportation of inflammable or explosive substances, service upon any railroad, steamboat or other vessel or boat; military and naval service of every kind, whether as combatant or non-combatant, the militia, in time of peace, excepted.

4. It is hereby declared and agreed that the self-
138 destruction of the person, whether he be sane or insane at the time, is not a risk assumed by the Society in this contract; but in every such case the Society will, upon demand made and the surrender of this Policy, accompanied with satisfactory proofs of such death, within ninety days after its occurrence, pay the net reserve upon it held by the Society at the beginning of the year in which death occurs, calculated by the present legal standard of the State of New York, first deducting therefrom any indebtedness which shall have accrued to the Society on account of this contract.

5. The contract between the parties hereto is completely set forth in this Policy and the application therefor, taken together, and none of its terms

can be modified, nor any forfeiture under it waived, except by an agreement in writing, signed by the President, Vice-President, Actuary, Secretary or Assistant Secretary of the Society, whose authority for this purpose will not be delegated; and it is further declared and agreed that, in case the obligation of the Society, under this contract, be defeated or its liability released by reason of any failure of any of the considerations, or by reason of the violation of any of the covenants or conditions recited or referred to herein, all payments which shall have been made to the Society on account of this contract shall belong to, and be retained by, the Society. 139

6. This policy, during its continuance, shall be entitled to participate in the distribution of the surplus of this Society, by way of increase to the amount insured, according to such principles and methods as may, from time to time, be adopted by this Society for such distribution, which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract, but the Society may, at any time before a forfeiture, upon the request of the person holding the absolute legal title to this Policy, substitute a cash payment, to be fixed by said Society, in lieu of the said increase to the amount insured, and such payment may be made by reduction of subsequent premiums, if said policy-holder shall so elect. 140 141

7. This Policy cannot be assigned except in accordance with the Law.

8. The prpofs of the death by which this contract matures shall be furnished to the Society within one year after such death, and shall contain full and true answers under oath to the questions in the Society's blanks for proofs of death, relating to the life, health and death of the person in question; and

142 shall include (1) a statement of the extent and character of each and every claimant's interest of the Policy; (2) the statement of the physician or physicians, if more than one, who attended the deceased during his last illness or within a year previous; (3) the statement of a responsible householder acquainted with the deceased; (4) the statement of the undertaker.

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(Filing page.) 145

No. 27,175.

THE

EQUITABLE

LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

120 BROADWAY, N. Y.

Assurance on the Life of

J. WILCOX BROWN. 146

Amount, $25,000.

Term, Life.

First Payment,	$5,847.75
Policy,	$ 1.
	$5,848.75

Quarterly.

$172.18

Premium due 30th Dec., March, June & Sept. 147

Register date of Policy:
Dec. 30th, 1867.

J. K. Lees, Printer, 210 Fulton Street, N. Y.

148 (Endorsement):

IN LIEU of the annual Premiums due hereafter on this Policy there shall be substituted quarterly Premiums, each of one hundred and seventy-two 18/100 dollars, payable on each thirtieth day of December, March, June and September hereafter, during the continuance of the Policy.

New York, Dec. 29th, 1876.

G. W. PHILLIPS,
Actuary.

Exhibit E.

149 "An agreement made in the City of New York, in the State of New York, this fifteenth day of June, one thousand nine hundred and five, between Thomas F. Ryan, of the first part, and Grover Cleveland, Morgan J. O'Brien and George Westinghouse (hereinafter called the 'Trustees'), of the second part.

"Whereas, the Equitable Life Assurance Society of the United States (hereinafter called the 'Society') is a corporation of the State of New York, having a full paid capital stock of one thousand (1,000) shares of the par value of one hundred dol-
150 lars ($100) each, of which five hundred and two (502) shares are held by the party of the first part; and

"Whereas, the corporate powers of the Society are vested by its charter in a Board of Directors consisting of fifty-two (52) persons, divided into four (4) classes of thirteen (13) directors each, each class serving for a term of four (4) years, so that thirteen (13) directors are elected at each annual election of the Society; and

"Whereas, the directors of the Society have adopted a plan for the mutualization of the Society by so amending its charter that of the fifty-two (52) directors of the Society twenty-eight (28) should be elected by the policy-holders and twenty-four (24) by the stockholders; and

"Whereas, the consummation of said plan of 151
mutualization and formal action thereon by the Superintendent of Insurance of the State of New York have hitherto been prevented by litigation, and in order to effect, so far as practicable and without further delay, the results sought to be attained by such plan of mutualization, the party of the first part has entered into this agreement with the Trustees.

"Now, this agreement witnesseth as follows:

"*First.*—The party of the first part hereby transfers to the Trustees said five hundred and two (502) shares of the capital stock of the Society for the 152
purpose of vesting in the Trustees the right to vote thereon for the term and upon the terms and conditions stated in this agreement. The existing certificates for said stock shall be surrendered and cancelled and certificates therefor shall be issued to the Trustees, in which certificates it shall appear that the same are issued pursuant to this agreement, and that fact shall also be noted in the entry of the Trustees as owners of such stock in the proper books of the Society.

"*Second.*—The Trustees are exclusively author- 153
ized to exercise the voting power on the stock held under this agreement for the election of directors of the Society, and shall at every annual election of directors of the Society so vote on said stock that out of every thirteen (13) persons for whom such vote shall be cast seven (7) shall be policy-holders of the Society, selected in accordance with the wishes of the policy-holders of the Society, expressed as hereinafter provided, and the remaining six (6) directors shall be selected by the Trustees in their uncontrolled discretion, to the end that of the entire fifty-two (52) directors, twenty-eight (28) shall be policy-holders of the Society, selected by or on behalf of the policy-holders, and twenty-four (24)

shall be lawfully eligible persons selected by the Trustees in their sole discretion.

"The wishes of the policy-holders in respect of the directors to be voted for by the Trustees shall be expressed in the following manner: In each year, at any time prior to the first day of November, any holder of any policy which shall have been in force for one year or more, may send to the Trustees, at the Equitable Building, No. 120 Broadway, New York City, a written request, designating policy-holders of the Society to the number of not more than seven-thirteenths of the number of directors to be elected at the next ensuing annual election of directors, for whose election as directors such policy-holders desire the Trustees to vote at such annual election, or requesting the Trustees to exercise their discretion on his behalf in the selection of policy-holders to act as such directors.

"*Third.*—The Trustees are authorized, in respect of said stock, to take, in their discretion, by vote thereon or otherwise, any action necessary or proper to effect the consummation of said plan for the mutualization of the Society by securing to the policy-holders the right to elect directly twenty-eight (28) of the fifty-two (52) directors of the Society, or a like proportion of the entire number of directors of which the Board of Directors shall from time to time consist.

"*Fourth.*—In case said plan of mutualization shall become operative, and the policy-holders shall become entitled to vote directly for twenty-eight (28) directors of the Society out of an aggregate number of fifty-two (52) directors, or a like proportion of any other number of which the Board of Directors may from time to time consist, then the Trustees, in respect of the stock held under this agreement, shall continue to vote for such lawfully eligible persons to be the remaining directors as they shall, in their uncontrolled discretion, select.

"*Fifth.*—In case of vacancies in the Board of 157
Directors, due to resignation, death or other cause, the Trustees may make recommendations to the directors of the Society as to the persons to be elected to fill such vacancies, to the end that the purposes of this agreement may be promptly and effectually accomplished.

"*Sixth.*—No vote shall be cast upon said stock for any purpose except with the unanimous approval of the Trustees, but the Trustees may empower any one of their number actually to cast their vote.

"*Seventh.*—Any Trustee may at any time resign 158
by delivering to the other Trustees his resignation in writing. In case of the death or resignation of any Trustee, the vacancy shall forthwith be filled by an appointment made in writing by the remaining Trustees. The term 'Trustee,' whenever used herein, shall include the parties of the second part, and their successors so appointed.

"*Eighth.*—The party of the first part shall be entitled to the dividends on the stock deposited by him under this agreement.

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"*Ninth.*—This agreement shall continue in force for the full period authorized by Section 20 of the General Corporation Law of the State of New York, viz: Five (5) years from the date hereof. It shall be continued thereafter so long as the Trustees shall deem advisable, and the party of the first part hereby agrees that, upon the expiration of any period of five (5) years, he will, upon the request of the Trustees, execute an instrument continuing, for a further period of five (5) years, this agreement and the powers of the Trustees hereunder, including said power to require an extension hereof. This agreement may, however, be terminated by the Trustees in their discretion when-

160 ever in their opinion its purposes have been accomplished, or for any reason its termination is, in their opinion advisable.

"*Tenth.*—Every other stockholder of the Society may transfer his stock to the Trustees, to be held subject to the provisions of this agreement, and thereupon may participate in the terms, condition and privileges thereof.

"In witness whereof, the parties hereto have set their hands unto five originals hereof the day and year first above written.

161 "THOMAS F. RYAN,
"GROVER CLEVELAND,
"MORGAN J. O'BRIEN,
"GEORGE WESTINGHOUSE.

"In presence of
"ELIHU ROOT,
"PAUL D. CRAVATH."

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Demurrer.

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IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

J. WILLCOX BROWN,
Complainant,

against

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant.

} In Equity.

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The demurrer of the above-named defendant, The Equitable Life Assurance Society of the United States, to the amended and supplemental bill of complaint of the above-named complainant:

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said complainant's amended and supplemental bill contained to be true in such manner and form as the same are therein set forth and alleged, both demur to the said amended and supplemental bill, and for causes of demurrer showeth:

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I.—That said bill does not contain any matter of equity whereon this Court can ground any decree or give to the complainant any relief against this defendant.

II.—This said bill discloses that complainant has an adequate remedy at law for any cause of action he has against this defendant.

166 III.—That complainant has not legal capacity to sue, for the reason that the judgment or decree sought by complainant herein will necessarily provide for an accounting or for enjoining, restraining or interfering with the prosecution of the business of this defendant, which is a domestic insurance corporation of the State of New York, and that this suit cannot be maintained except upon the application of the Attorney General of the State of New York on his own motion or after his approval of a request in writing therefor of the Superintendent of Insurance, as provided by Section 56 of the Insurance Law of the State of New York.

167 IV.—That complainant has no interest in the subject matter of said bill.

V.—That complainant's said bill does not disclose facts sufficient to entitle him to the relief prayed for therein.

VI.—That there is a want of proper parties plaintiff, in that complainant's wife, Turner W. Brown, and his children, who are the beneficiaries
168 named in the policy of insurance mentioned and described in said bills are not made parties.

VII.—That there is a want of proper parties defendant, in that the officers and directors of defendant are not made parties to said bill.

VIII.—That there is a want of proper parties defendant, in that the stockholders of defendant are not made parties to said bill.

IX.—That there is a want of proper parties defendant in that complainant has not made other policy-holders of defendant parties to said bill, it plainly appearing that they are to be affected by

the judgments and decrees asked for by com- 169
plainant herein.

X.—That there is a want of proper parties defendant, in that complainant has not made the annuitants of defendant mentioned in said bill parties to said bill, it plainly appearing that they are to be affected by the judgments and decrees asked for by complainant therein.

XI.—That complainant's said bill is multifarious, in that there are joined therein several and distinct and independent grounds of equitable relief, including an alleged cause of action for an accounting, and an alleged cause of action for an injunction, 170
and the appointment of a receiver to take the administration of defendant's property and business out of the hands of this defendant, its officers and agents.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant doth demur thereto, and prays the judgment of this honorable Court whether it shall be compelled to make any answer to the said bill, and humbly prays to be dismissed hence, with its reasonable cost and charges in this behalf most wrongfully sustained.

ALEXANDER & GREEN,
Solicitors for Defendant, The Equitable 171
Life Assurance Society of the United States.

ALLAN MCCULLOH,
CHARLES W. PIERSON,
Of Counsel.

I hereby certify that in my opinion the foregoing demurrer to the said amended and supplemental bill of complaint of J. Wilcox Brown, the above-

172 named complainant, is well founded in law and proper to be filed in the above case.

ALLAN McCULLOH,
CHARLES W. PIERSON,
Of Counsel for the Defendant, The Equitable Life Assurance Society of the United States.

STATE OF NEW YORK,
County of New York,
Southern District of New York, } ss.:

173 W. ALEXANDER, being duly sworn on oath, deposes and says: That he is the secretary of The Equitable Life Assurance Society of the United States, the defendant in the above entitled cause; that he has read the foregoing demurrer to the amended and supplemental bill of complaint herein, and that the same is not interposed for the purpose of delaying the said suit or any proceedings therein, and that this deponent makes this affidavit as such secretary of said defendant corporation.

WILLIAM ALEXANDER.

Subscribed and sworn to before me, a notary public, by William Alexander this 1st day of September, 1905.

174 JOHN B. RUSSELL,
Notary Public,
N. Y. Co., 125.

UNITED STATES CIRCUIT COURT, 175

SOUTHERN DISTRICT OF NEW YORK.

J. WILLCOX BROWN,
Complainant,

AGAINST

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant.

} In Equity.

176

DOS PASSOS BROTHERS, BATTLE & MARSHALL, JOSEPH DEF. JUNKIN, Solicitors and Counsel for Complainant.

ALEXANDER & GREEN, WILLIAM D. GUTHRIE, ALLAN MCCULLOH, Solicitors and Counsel for Defendant.

HAZEL, *J.*:

This suit in equity was brought by a citizen of the State of Maryland against the defendant, The Equitable Life Assurance Society of the United States, a corporation organized in the year 1859 to effect life insurance upon the plan of what is commonly 177
known as mutual insurance, under the general laws of the State of New York, passed June 24, 1853, and acts amendatory thereof. The orator is a holder of a policy, and this action is in his behalf and in behalf of such other policyholders and annuitants in the defendant company as may choose to join in the bill. The issues have arisen upon the defendant's demurrer to the complaint. The grounds of demurrer are, first, that no cause for equitable relief is stated; second, that there is adequate remedy at law; third, that this

178 action is not maintainable except upon the application of the Attorney-General of the State or after his approval as provided by Section 56 of the Insurance Law of the State, and the general ground that no cause of action is stated in the bill. Other grounds of demurrer were assigned, but they need not be specially stated, as the principal grounds argued at the bar were those herein mentioned. The object of the bill is to secure an accounting to protect and conserve the rights and assets of the policyholders, while a reorganization of the defendant company is being perfected; and, further, that the net surplus when ascertained be equitably apportioned among the various policy-
179 holders, past and present, under the supervision and control of the Court and its receiver. The questions submitted are of great importance to a multitude of interested persons, 560,000 in number, who are insured in the defendant company, and to the public generally. The legal principles involved directly affect important contractual rights and obligations, while the faithfulness and rectitude of the officers of the society (though not joined as parties), in whom hitherto the complainant has reposed reliance and confidence, are challenged. The decision of this controversy upon purely equitable grounds is a grave responsibility, and one which requires diligent and painstaking consideration of the various proposi-
180 tions involved and arguments submitted in behalf of a suitor who invokes the intervention of a Federal tribunal to redress alleged wrongful and fraudulent acts committed by the defendant. The complaint is very lengthy and is accompanied by Exhibits "C" and "D," which constitute the report of an investigating committee from the Board of Directors of the defendant, and the report of the Superintendent of Insurance of the State of New York. The point that the bill does not state a cause of action practically includes all the grounds of the demurrer and must be determined upon an examination of the complaint in

connection with the relation which the suitors sustain to one another. A summary of the salient features of the bill follows. It is alleged that wrongful and fraudulent acts were committed by The Equitable Life Assurance Society, resulting in the spoliation of its assets on account of which the complainant claims to be deprived of certain property rights and distributive interests in the accumulations of the society, which inured to him and the policyholders under the intendment of the contract of insurance. The bill proceeds upon the theory that the relationship under the policy between the assured and the society was of a fiduciary character, and that the assets in its possession and control were held solely by it as trustee for the policyholders. The defendant was incorporated with a capital stock of $100,000, divided into one thousand shares of the par value of $100 each. The charter after providing for a transference on the books of the company of the capital stock, and that the holders shall be entitled to receive a semi-annual dividend thereon not to exceed 3 1/2 per cent., states that the dividends shall be paid at the times and in the manner designated by the directors, and that "the earnings and receipts of said company over and above the dividends, losses and expenses, shall be accumulated." A policy of insurance dated January 12, 1876, was issued to the orator to the amount of $25,000, and in consideration of future payments of premiums the society promised to pay said amount upon the death of the assured to his wife if living, or if not living to his surviving children, and if none survived him then to his executors and administrators. Said policy of insurance which is known as a straight life policy, is still in force and was accepted by the defendant upon the condition that certain provisions printed on the back thereof should become a part of the contract. Among other provisions is the following:

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> "This policy, during its continuance, shall be entitled to participate in the distribution of

the surplus of this Society, by way of increase to the amount insured, according to such principles and methods as may, from time to time, be adopted by this Society for such distribution, which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract, but the Society may, at any time before a forfeiture, upon the request of the person holding the absolute legal title to this policy, substitute a cash payment, to be fixed by said Society, in lieu of the said increase to the amount insured, and such payment may be made by reduction of subsequent premiums, if said policyholder shall so elect."

All the premiums were paid by complainant as required by the rules and regulations of the society and he elected to receive his share of the surplus in reduction of the premiums due from him upon a basis of the equitable share thereof. Such election by the complainant was ratified and accepted by the defendant. He claims, however, that the real dividends, *i. e.*, the actual proportionate share of the accumulations or "true surplus" has never been equitably distributed; in short, that the society, instead of crediting him with the full share to which he deems himself equitably entitled, has only credited a portion, retaining a large amount of said net surplus and wrongfully appropriating the same. In this situation, the bill avers, the stockholders of the society wrongfully and fraudulently claim to own the surplus as an earning of their capital stock. A schedule showing the amount of outstanding assurance, together with the assets, liabilities and surplus of the society since its organization, is incorporated in the bill, and it appears that in the year 1904 the surplus amounted to the enormous sum of $80,794,269 over and above the amount required by the statutes of the State to be reserved to pay the society's outstanding obligations and liabilities. It is asserted

that a large surplus such as that stated is contrary 187
to law and entirely unnecessary for the prudent and righteous management of the society's affairs; that its ascertained surplus is fraudulently diverted and retained, the complainant meanwhile being deprived of the benefits thereof; that the discretion vested under the charter of the society in its directors and officers, has been flagrantly abused; and that under the principle and method adopted by the society for the distribution of its surplus, $10,000,000 is improperly retained and dishonestly diverted by the defendant, which claims that such surplus and profits do not belong to the policyholders; that the failure to make equitable distribution by virtue of the authority conferred upon 188
the society is to enable it to buy securities from syndicates formed by its directors and officers, at higher prices than the prices agreed to be paid therefor by such directors or managers; and that the object of such method of transacting the business of the defendant was to accumulate an illegal fund out of which wasteful and extravagant salaries and expenses might be paid; that there is dissension in the Board of Directors. It is also alleged that the control of the majority of the capital stock has passed into the possession of one Ryan, it having been sold and transferred to him by the former owner, one Hyde, for the sum of $2,500,000; that said Ryan, notwithstanding the delivery by 189
him of a deed of trust, is the managing spirit of the society and is illegally carrying on its business. Insolvency of the defendant corporation is set forth in the bill as follows:

> "That the said Society is responsible in law and equity to the policyholders for excessive sums paid in the way of salaries and fees, and also for all sums of money and damages consequent upon fraud, waste, neglect or wilful mismanagement of the property and affairs of the Society. That these sums

190 amount at the present time to many hundred thousands of dollars in excess of the capital of $100,000, and as to which your orator and the other policyholders are entitled to an accounting, and the Society has no funds with which to meet these enormous losses, but is insolvent. The property of the defendant is now in the hands or under the control of the stockholders, whose representatives have been guilty of misappropriation, waste, fraud and neglect in the management of its affairs and property. The business and affairs of the Society are at a standstill; its morals as an insurer is destroyed; whatever business it
191 may do will be at an enormous loss and sacrifice on the part of the present policyholders. Their supreme interest is to place the assets in the hands of competent receivers, appointed by this Court, and to gradually, prudently and economically wind up the affairs of the Company. In this way only can the policyholders and annuitants be protected from eventual and irretrievable loss."

The bill further avers that the orator has no adequate remedy at law; that irreparable injury by a continuance of the wrongful acts specified is
192 threatened, and, therefore, there should be a discovery with an accounting under the direction of the Court. The first contention of the complainant is that as the policy of insurance under the contract is upon the principle of mutuality, the assets of the defendant are held in trust for the benefit of the assured. Undoubtedly an element of trust and confidence is present in an arrangement by which life insurance becomes payable according to the terms of the policy upon compliance by the assured with the imposed conditions. If the contract of insurance is broken by the insurer, it may not be inapplicable to state that there was a breach of trust

in a broad sense, although the remedy to enforce the 193
liability of the company would not be for a fiduciary debt. The rights and liabilities out of such a relationship spring entirely from the contract, and are simply those of creditor and debtor. Such is the uniform holdings of the decisions. The cases herein cited held that contracts of insurance upon lives are not essentially different from ordinary agreements and they must be interpreted and governed by the ordinary legal principles (St. John *vs.* The American Mut. Life Ins. Co., 13 N. Y., 31; Greeff *vs.* The Equitable Life Assur. Soc., 24 Misc., 98; affirmed, 160 N. Y., 19). The claim that the defendant has failed to equitably apportion the earned accumulations does not in the first instance operate to bind 194
said defendant to render an accounting to a policyholder. It will be observed that the insured by the terms of his policy becomes entitled to certain accretions to the fund of the society which are apportionable according to previously adopted principles and methods. He is entitled to participate in the distribution which the society in the exercise of its discretion concludes to make. Under the provisions of the charter, the insured has the privilege of preferring a cash payment in reduction of his premium, the amount to be determined as provided in the contract, that is to say, he was entitled to have accredited an equitable share of the surplus. Whether the distribution of only a por- 195
tion of the net surplus was an equitable share thereof is a question not free from difficulty, although it is not denied that such distribution was made according to principles and methods adopted by the society. Having carefully examined the authorities to which attention is directed, I have reached the conclusion that the effect of the language of the charter that "each policyholder shall be credited with an equitable share of the said surplus" depends upon the sagaciousness and discretion of the directors who are directly charged with the responsibility of conservatism in the management

196 of the affairs of the society. The question is admittedly of material importance. It has heretofore several times been held that the charter of the society reasonably construed does not provide for a division or allotment of the entire surplus. In Greeff *vs.* Equitable Life Assur. Soc., *supra*, Martin, *J.*, speaking for the Court, says:

> "What it (the charter) does provide is that when ascertained each policyholder shall be credited with an equitable share of the surplus, to be determined and applied in the manner stated, and that the earnings and receipts over and above the dividends, losses and expenses, shall be accumulated. Hence,
197 if we assume that the charter and not the contract is to control (which we by no means hold), then the question at once arises who is to determine what an equitable distribution of the surplus is. Or, in other words, the question is, who is to determine how much of the surplus shall be distributed to the policyholders, and how much shall be accumulated and retained for the security of the Society and its members."

Complainant contends that though wise and prudent management of the affairs of the society is re-
198 quired of its officers and directors, yet upon the ascertainment of the net surplus the society is obliged under the terms of the policy to equitably apportion the entire fund. Such, it is urged, was the insurance contract; for if otherwise, it would be a fraud upon the policyholders, who are induced to contract under the supposition that they will become interested in the profits. Counsel for the complainant argues that any other conclusion does violence to the principle of mutual insurance. The construction, however, placed by the Court of Appeals in the Greff case upon the word "surplus" as employed in the defendant's charter apparently does not refer to

a distributable surplus, but simply represents the 199
fund or surplus on hand after certain contingent liabilities were deducted and taken into consideration by the Board of Directors in fixing the surplus which in the judgment of the board should be apportioned. The Court says:

> "When that amount was ascertained, it became the duty of the officers of the defendant to determine the portion of such surplus which should be distributed and the portion which should be retained for the benefit and security of the company and its members."

Emphasis is placed upon the facts inferable from
the contract, that the directors were clothed with a 200
discretion to positively and definitely state the amount of an apportionable surplus as distinguished from the surplus prior to ascertainment of the amount appropriated for the benefit of the policyholders. This proposition was again recently considered in Buford *vs.* The Equitable Life Assurance Society of the United States (opinion not yet reported). The opinion states:

> "The legal reserve required to be maintained by every life insurance company is ascertained upon rules laid down by statute (Secs. 84 and 86, Insurance Law). The directors and officers of the company have no dis- 201
> cretion to exercise concerning it. It assumes as factors for its computation a valuation of the assets of the corporation, the natnre and extent of its outstanding policies, a specified experience table of mortality and a stated rate of interest. It may be said to represent the minjmum sum necessary to have in hand to avoid the imputation of insolvency. The amount to be set aside under the defendant's charter to cover all outstanding risks and other obligations is left to the determination of the officers of the company. * * *

202 There is nothing in the charter which would justify a belief that, when its framers provided for setting aside a portion of the surplus to meet the existent and prospective claims, they had in mind what is now known as the statutory legal reserve or that they intended to limit the officers to setting apart that amount and no more."

In Uhlman *vs.* N. Y. Life Ins. Co., 109 N. Y., 421, the Court of Appeals, Judge Peckham writing for the court, after remarking that the apportionment under the agreement should be an equitable one, and that the question of what is an equitable one is
203 determinative upon the facts and circumstances over which courts have control, says:

"*Prima facie*, apportionment, as made by the defendant, should be regarded as a compliance with the terms of the policy, or in other words should be regarded as an equitable apportionment. * * * And the plaintiff and all others similarly situated have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial and make proof of such allegations, and, if proved, the Court will declare the proper principles upon which
204 the apportionment is to be made so as to become an equitable apportionment."

Later, in the Greeff case, the Court of Appeals, considering this question, says:

"Manifestly, that question is to be decided by the officers and managers of the defendant, who are to exercise their discretion in determining it, having in view the present and future contingencies of the business. In the absence of any allegation of wrong-doing or mistake by them, their determination of

the question must be treated as proper, and 205
their apportionment of the surplus is *prima facie* to be regarded as equitable."

Counsel for complainant insists that the decisions from which excerpts have just been taken show that though an action at law is untenable equity will afford proper relief, it being charged in the bill *inter alia* that the officers of the company abused their discretion in relation to the surplus. This, it is thought, is a strained interpretation of the decisions in the Uhlman and Greeff cases, for, as there held, the policyholder has no actual interest in the surplus until it is equitably apportioned. The bill is not framed to compel the officers to act or to re- 206
quire them to perform their duties. Indeed, dividends have at different times been declared, but the amount thereof, or to what extent, does not appear. So that, in my judgment, the remedy in equity indicated in the above cited cases refers to instances where there is an absolute failure by the officers to ascertain and apportion the surplus. Numerous authorities to which attention is directed are decisive in their holding that no trust relationship is established under a contract such as that in question. It will be necessary only to refer to a few of them. In Bewley *vs.* Equitable Life Assur. Soc., 61 How. Pr., 344, a policyholder claimed that the society and its directors held its surplus profits in 207
trust for the policyholders. He alleged a breach of trust, mismanagement and misappropriation of the assets of the society by its officers. The Court held that no trust was created, and, moreover, that policies of insurance are governed by the ordinary principles. This principle finds unquestionable support in People *vs.* Security Life Ins. Co., 78 N. Y., 114; Cohen *vs.* N. Y. Mutual Life Ins. Co., 50 N. Y., 610; Taylor *vs.* Charter Oak Life Ins. Co., 59 How. Pr., 468; Swan *vs.* Mutual Reserve Fund Life Assn., 20 App. Div., 255; Everson *vs.* Equitable Life Assur. Soc., 58 Fed., 258, affirmed Third Circuit, 71 Fed.,

208 570; Hunton *vs.* Equitable Life Assur. Soc., 45 Fed., 661, and Pierce *vs.* Equitable Life Assur. Soc., 145 Mass., 56. These decisions are not inapplicable to the present case, and, I think, correctly state the law. In the light of events adverted to in the bill, such enunciated principle may be regarded as constrained and exacting, but beyond doubt it was thereby intended to ensure both the safety and security of the premium-holders and life assurance societies. No useful purpose will be served by a further statement of any independent views, inasmuch as I conceive it to be my duty upon these questions to follow the decisions of the highest tribunal of the State of New York,
209 the State whose Legislature created the defendant and by whose laws the contract must be governed and controlled. The objection that there is no trust of fiduciary relationship such as alone entitles complainant to maintain this suit, is sound. I now come to briefly discuss the question of waste and wrongful acts alleged to have been committed by the officers of the society. The Frick report and the report of the State Superintendent of Insurance, Exhibits "C" and "D" attached to the bill, are claimed to show such wrongdoing. But I do not think that complainant has a right to equitable relief in the present form of the bill because of such asserted wrongdoing. The society has the unques-
210 tionable power to redress such wrongful acts by the ordinary legal instrumentalities inasmuch as they were not committed against the complainant, a holder of a policy. His interests, as said, are distinctly under the contract, which does not contemplate a management by the policyholder of the business of the society or even a right to "dictate the amount of the dividend it shall declare, or question the result after the discretion of its managers has been exercised in this behalf" (Fuller *vs.* Knapp, 24 Fed., 105). Upon the question of insolvency of the defendant, assuming complainant's right to invoke the jurisdiction of the Court on ac-

count thereof, it is only thought necessary to say 211
that the material averments upon this subject contained in the bill, together with Exhibits "C" and "D," negative such claim. Indeed, a careful reading of the complaint leads to the conclusion that the society is solvent and abundantly able to meet all its obligations. Neither is the complainant, in the absence of a trust relation or other grounds of jurisdiction, entitled to an accounting (Hunton *vs.* Equitable Life Assur. Soc., *supra;* Everson *vs.* Equitable Life Assur. Soc., *supra*). In the latter case, the complainant sought an accounting and discovery in aid thereof solely because no account by the defendant insurance company had, on demand, been made. The questions before the Court were 212
on demurrer to the bill, and Judge Buffington, who heard the case, says:

> "An alleged breach of contract obligations, and the ensuing accountability to answer in damages therefor, do not necessarily imply liability to an accounting by bill in equity. In other words, accountability does not imply liability to an accounting in equity. But prior liability to so account is the foundation upon which a bill in equity for an accounting rests."

And the opinion continues:

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> "But unless there was a duty to account, the complainant cannot base his bill on respondent's failure so to do, for such refusal was not a denial of what complainant was entitled to demand."

Hence, this not being a controversy for the adjustment of complicated or mutual accounts between the parties, I am of opinion that Judge Buffington correctly states the rule, and that an accounting and discovery must be regarded as incidental to the principal grounds upon which the jurisdiction of

214 the Court is based. Such is the holding of the cases (Hare on Discovery, Secs. 6–8; Story's Eq. Pl., Sec. 331; Safford *vs.* Ensign Mfg. Co., 120 Fed., 480; Preston *vs.* Smith, 26 Fed., 884). Another objection, namely, that Sec. 56, Chap. 690 of the Laws of 1892 of the State of New York, expressly prohibits the appointment of a receiver and an accountant unless the Attorney-General makes the application or approves the same, will now be considered. This provision is restrictive in its nature, and its binding force apparently depends upon whether the State statutes are a part of the contract. It is well settled that a holder of a policy, even though a citizen of a foreign State, is presumed to
215 know the provisions of the statute from which the insurance corporation obtains its existence. That the assured is bound by the provision of the charter, by-laws and rules of the company scarcely needs citation of authorities. Upon making formal application for insurance, the complainant expressly consented that the affairs of the company were to be managed and regulated under the provisions of the statute. It is not shown that the policy in question was surrounded by any special conditions or circumstances. True, the statute in question had not then been enacted, but this is immaterial, as the charter in terms provides that the company shall "be subject to all the regulations, restrictions and obliga-
216 tions" imposed by the Act of June 24, 1853, and subsequent amendments thereto, under which, as we have seen, the society was incorporated. Complainant contends that the statute is simply descriptive of the remedy and does not effect redress in a proper case in equity, and numerous cases are cited to show that a State statute cannot deprive a Federal court of its jurisdiction. This is as broad, general proposition, is absolutely true, that is to say, the equity jurisdiction of the courts of the United States are not confined or restricted by State statutes. But in my view of this controversy, we are not here concerned with the curtailment or restric-

tion of the equity powers of this Court, and the cases 217
cited are distinguishable from the point under discussion. They are principally concerned with controversies where an attempt has been made by the State statutes to limit jurisdiction to a particular State court and to confine the remedy to that forum. Where, however, the contract of insurance subjects the assured to "the operation of the organic law of a corporation by becoming a member of it" a different principle, beyond doubt, governs the status of the parties (Rundel *vs.* Life Assn. of America, 10 Fed., 720; Fry *vs.* Charter Oak Life Ins. Co., 31 Fed., 197; Relfe *vs.* Rundle, 103 U. S., 222). In Canada Southern Railroad Co. *vs.* Gebhardt, 109 U. S., 327, the Supreme Court, speaking of the rights and 218
liabilities of persons who subject themselves to the laws of a corporation of a foreign country, says:

> "But wherever it goes for business it carries its charter, as that is the law of its existence, * * * and the charter is the same abroad that it is at home. Whatever disabilities are placed upon a corporation at home it retains abroad, and whatever legislative control it is subject to at home must be recognized and submitted to by those who deal with it elsewhere."

So in this case the defendant is entirely controlled by the statute under consideration and the doctrine 219
quoted is thought not inapposite. The statute has been upheld and approved by the Court of Appeals of this State. In Swan *vs.* Mutual Reserve Fund Life Assn., 155 N. Y., 9, it is said:

> "In the enactment we have an express declaration of the Legislature upon the subject, which may be regarded as voicing a policy of the law. * * * It cannot be said that the enactment of such a law is without good reason, or is against a wise public policy."

220 The opinion further states as follows:

> "Nor is the act at all in violation of any constitutional right of the plaintiff, as impairing the obligation of a contract. It furnishes a remedy, * * * and prescribes a method of procedure by which that remedy may be applicable to every person situated as the plaintiff is."

This view of the statute has been distinctly approved in the Greeff case, *supra*. In Relfe *vs.* Rundle, *supra*, an insolvent life insurance company was dissolved by order of the Court and the assets under the Statute of the State of its creation
221 were vested in the superintendent of the insurance department. Held, that as the statute was in existence at the time the charter of the company was granted it became a part thereof, and the law which clothed the superintendent with power to wind up the affairs of the corporation was binding upon the complainant, a citizen of Missouri. This would seem to be an approval of the contention that Sec. 53 of the Insurance Law of this State is embraced in the contract. Much was said at the hearing in relation to the charge that the society had appropriated $10,000,000 out of the net surplus which it claimed belonged to the stockholders and not to the policyholders. In the view taken by me of the
222 principal issues involved and the conclusions reached thereon, a decision on this point of course is not essential. It follows that complainant has no legal capacity to bring this suit, and no cause of action is stated in the bill. The demurrer is sustained, with costs, and the bill dismissed.

(Endorsed)—United States Circuit Court, Southern District of New York.—In Equity.—J. Willcox Brown *vs.* The Equitable Life Assurance Society of the United States.—Opinion, Hazel, *J.*—U. S. Circuit Court, Southern District, New York.—Filed Jan. 8, 1906.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT, 223

SOUTHERN DISTRICT OF NEW YORK.

J. WILLCOX BROWN,
Complainant,

AGAINST

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant.

224

SIRS:

You will please take notice that an order sustaining the demurrer of The Equitable Life Assurance Society of the United States in the above entitled action, a copy of which is herewith served upon you, will be presented for settlement to the Hon. John R. Hazel, one of the Judges of this Court, on the 16th day of January, 1906, at 10.30 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, at the office of the Clerk of the above named Court, in the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York.

Dated New York, January 13, 1906. 225

Yours, &c.,

ALEXANDER & GREEN,
Solicitors for Defendant.
Office and P. O. address,
No. 120 Broadway,
Borough of Manhattan,
City of New York, N. Y.

To Messrs. DOS PASSOS BROTHERS,
Messrs. BATTLE & MARSHALL,
JOSEPH DEF. JUNKIN, Esq.,
Solicitors for Complainant.

226 At a Stated Term of the United States Circuit Court for the Southern District of New York, held in said District, at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 18th day of January, 1906.

Present—Hon. JOHN R. HAZEL,
U. S. Circuit Judge.

227 J. WILLCOX BROWN,
Complainant,

AGAINST

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant.

In Equity.

This cause having come on to be heard on the amended and supplemental bill of complaint herein
228 and the demurrer of the defendant thereto, and the respective parties having appeared by their solicitors, and the Court having heard William D. Guthrie, Esq., and Allan McCulloh, Esq., of counsel for the defendant, in support of said demurrer, and John R. Dos Passos, Esq., of counsel for complainant, in opposition thereto, and due deliberation having been had;

Now, on motion of Alexander & Green, solicitors for the defendant, it is

Ordered, that the demurrer to the amended and supplemental bill of complaint herein be, and the same hereby is, sustained; and the said amended

and supplemental bill of complaint be, and the same 229
hereby is, dismissed, with costs and disbursements.

JOHN R. HAZEL,
U. S. J.

(Endorsed)—United States Circuit Court, Southern District of New York.—J. Willcox Brown, Complainant, against The Equitable Life Assurance Society of the United States, Defendant.—Order for Judgment with Notice of Settlement.—Alexander & Green, Solictors for Defendant. Office & P. O. Address, No. 120 Broadway, Borough of Manhattan, City of New York, N. Y.—Service of a copy of the within Order and Notice of Settlement is hereby ad- 230
mitted. Saturday, January 13th, 1906. Dos Passos Brothers, Battle & Marshall, Joseph De F. Junkin, Solicitors for Complt.—U. S. Circuit Court, Southern District New York.—Filed Jan. 18, 1906.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. WILLCOX BROWN, Complainant, AGAINST THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant.	In Equity.

231

This cause having come on to be heard on the amended and supplemental bill of complaint herein and the demurrer of the defendant thereto before

232 the Hon. John R. Hazel, one of the Justices of this Court, at a Term of this Court, held at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 14th day of December, 1905, and the respective parties having appeared by their solicitors, and the Court having heard William D. Guthrie, Esq., and Allan McCulloh, Esq., of counsel for defendant, in support of said demurrer, and John R. Dos Passos, Esq., of counsel for complainant, in opposition thereto, and due deliberation having been had, and an order having been duly entered and filed herein on the 18th day of January, 1906, sustaining the said demurrer to the amended and supplemental bill
233 of complaint herein and dismissing the said amended and supplemental bill of complaint, with costs and disbursements; and the costs and disbursements of the defendant having been duly adjusted at the sum of one hundred one and 82/100 ($101.82) dollars;

Now, on motion of Alexander & Green, solicitors for the defendant, it is

Adjudged and decreed, that the demurrer to the amended and supplemental bill of complaint herein be, and the same hereby is, sustained, and the said amended and supplemental bill of complaint be, and the same hereby is, dismissed; and it is

Further adjudged and decreed, that the defendant
234 have and recover judgment against the complainant for the sum of one hundred and one and 82/100 ($101.82) dollars, costs and disbursements as adjusted, and have execution hereon therefor.

Dated New York, January 24, 1906.

JOHN R. HAZEL,
U. S. J.

(Endorsed)—United States Circuit Court, Southern District of New York.—J. Willcox Brown, Complainant, against The Equitable Life Assurance Society of the United States, Defend-

ant.—Decree.—Alexander & Green, Attorneys for Defendant, No. 120 Broadway, New York City, N. Y.—U. S. Circuit Court, Southern District, New York.—Filed Jan. 27, 1906.—John A. Shields, Clerk. 235

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. WILLCOX BROWN,
Complainant,

AGAINST

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant.

236

In Equity.
No.

Petition for Appeal.

The above named complainant, J. Willcox Brown, conceiving himself to be aggrieved by the decree made and entered by the above Court in the above entitled cause, under date of January 24, 1906, wherein and whereby it was adjudged and decreed that the demurrer to the amended and supplemental bill of complaint herein be sustained, and the said amended and supplemental bill of complaint be dismissed, and it was further adjudged and decreed that the defendant have and recover from the complainant the sum of $101.82, the costs and disbursements as adjusted, and have execution therefor, does hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from said decree, for the reasons set forth in the assignment 237

238 of errors, which is filed herewith; and he prays that this his petition for his said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated February 9, 1906.

Dos Passos Bros.,
Battle & Marshall and
Joseph De F. Junkin,
Solicitors for Complainant.

The foregoing petition on appeal is granted, and
239 the claim of appeal therein made is allowed this 9th day of February, 1906.

E. H. Lacombe,
Circuit Court Judge.

(Endorsed)—United States Circuit Court, Southern District of New York.—J. Willcox Brown, Complainant, against The Equitable Life Assurance Society of the United States, Defendant.—Petition on appeal and order.—Dos Passos Bros., Battle & Marshall and Joseph De F. Junkin, Solicitors for Complainant.—Copy of the within Petition received Feb'y. 16, 1906. Alexander & Green, Solicitors for Defendant.—U. S. Circuit Court, Southern District of New York.—
240 Filed Feb. 16, 1906.—John A. Shields, Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES 241

FOR THE SOUTHERN DISTRICT OF NEW YORK.

J. WILLCOX BROWN,
Complainant,

AGAINST

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant.

In Equity.
No.

242

Assignment of Errors.

And now comes J. Willcox Brown, complainant herein, by Dos Passos Bros., Battle & Marshall and Joseph De F. Junkin, his solicitors, and says that the decree entered herein in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York, on the 24th day of January, 1906, upon the order of the Honorable J. R. Hazel, sitting in equity in the above entitled cause, sustaining the demurrer of the defendant to the amended and supplemental bill of complaint 243 herein, and dismissing same is erroneous, because:

FIRST.—The Court erred in adjudging and decreeing "that said bill does not contain any matter of equity whereon this Court can ground any decree or give to the complainant any relief against this defendant."

SECOND.—The Court erred in adjudging and decreeing "that said bill discloses that complainant

244 has an adequate remedy at law for any cause of action he has against this defendant."

THIRD.—The Court erred in adjudging and decreeing "that complainant has not legal capacity to sue for the reason that the judgment or decree sought by complainant herein will necessarily provide for an accounting or for enjoining, restraining or interfering with the prosecution of the business of this defendant, which is a domestic insurance corporation of the State of New York, and that this suit cannot be maintained except upon the application of the Attorney-General of the State of New York on his own motion or after his approval of a request in
245 writing therefor of the Superintendent of Insurance, as provided by Section 56 of the Insurance Law of the State of New York."

FOURTH.—The Court erred in adjudging and decreeing "that complainant has no interest in the subject matter of said bill."

FIFTH.—The Court erred in adjudging and decreeing "that complainant's said bill does not disclose facts sufficient to entitle him to the relief prayed for therein."

246 SIXTH.—The Court erred in adjudging and decreeing "that there is a want of proper parties plaintiff, in that complainant's wife, Turner W. Brown, and his children, who are the beneficiaries named in the policy of insurance mentioned and described in said bill, are not made parties."

SEVENTH.—The Court erred in adjudging and decreeing "that there is a want of proper parties defendant in that the officers and directors of defendant are not made parties to said bill."

EIGHTH.—The Court erred in adjudging and decreeing "that there is a want of proper parties defendant in that the stockholders of defendant are not made parties to said bill." 247

NINTH.—The Court erred in adjudging and decreeing "that there is a want of proper parties defendant in that complainant has not made other policyholders of defendant parties to said bill, it plainly appearing that they are to be affected by the judgment and decrees asked for by complainant herein."

TENTH.—The Court erred in adjudging and decreeing "that there is a want of proper parties defendant in that complainant has not made the annuitants of defendant mentioned in said bill parties to said bill, it plainly appearing that they are to be affected by the judgments and decrees asked for by complainant herein." 248

ELEVENTH.—The Court erred in adjudging and decreeing "that complainant's said bill is multifarious, in that there are joined therein several and distinct and independent grounds of equitable relief, including an alleged cause of action for an accounting, and an alleged cause of action for an injunction and the appointment of a receiver to take the administration of defendant's property and business out of the hands of this defendant, its officers and agents." 249

TWELFTH.—The Court erred in not overruling the demurrer interposed by defendant to the complainant's amended and supplemental bill of complaint, and in ordering the said supplemental bill of complaint to be dismissed.

Wherefore, complainant prays that the decree of said Circuit Court may be reversed, and such directions be given that full force and efficacy may enure

250 to plaintiff by reason of their amended and supplemental bill filed in said cause.

DOS PASSOS BROS.,
BATTLE & MARSHALL and
JOSEPH DE F. JUNKIN,
Attorneys for Complainant.

(Endorsed)—U. S. Circuit Court, Southern District of New York.—J. Willcox Brown, Complainant, against The Equitable Life Assurance Society of the United States, Defendant.—Assignment of Errors.—U. S. Circuit Court, Southern District, New York.—Filed Feb. 9, 1906.—John A. Shields, Clerk.

251

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. WILLCOX BROWN,
Complainant,

AGAINST

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED
252 STATES,
Defendant.

Undertaking on Appeal.

WHEREAS, on the 16th day of January, 1906, in the above-entitled Court the demurrer interposed by the defendant by the complainant's amended and supplemental bill of complaint was sustained by J. R. Hazel, one of the Judges sitting in equity in the United States Circuit Court for the Southern District of New York, by order duly signed and entered in the office of the Clerk of said Court, and whereas on the 24th day of January, 1906, a decree

waf duly entered in the office of said Clerk of said 253
Court, sustaining said demurrer and dismissing with costs the said bill.

And the said complainant, J. Willcox Brown, feeling aggrieved thereby, intends to appeal therefrom to the Circuit Court of Appeals for the Second District of the United States;

Now, therefore, the Bankers' Surety Company of Cleveland, having an office and principal place of business for the State of New York at No. 170 Broadway, in the Borough of Manhattan, in the City of New York, does hereby, pursuant to the statute in such case made and provided, undertake that the appellant will pay all costs and damages which may be awarded against the appellant on said 254
appeal, not exceeding the sum of five hundred dollars, and does also undertake, that if the decree so appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the sum recovered or directed to be paid by the decree or the part thereof as to which said decree shall be affirmed.

Dated New York, February 6, 1906.

THE BANKERS SURETY COMPANY.
JULIEN J. MASON,
[SEAL.] 3d Vice-President.
HERBERT L. MARSH,
Assistant Secretary.

255

256 STATE OF NEW YORK, }
County of New York, } ss.:

On this 6th day of February, 1906, before me personally came and appeared Julien J. Mason, to me known, who being by me duly sworn, did depose and say: That he resided in the City of New York, State of New York; that he was the third vice-president of The Bankers Surety Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order;
257 and the liabilities of said company do not exceed its assets as ascertained in the manner provided in Section 3 of Chapter 720 of the Laws of the State of New York for the year 1893.

And the said Julien J. Mason further said that he was acquainted with Herbert L. Marsh, and knew him to be the assistant secretary of said company; that the signature of the said Herbert L. Marsh subscribed to the within instrument was in the genuine handwriting of the said Herbert L. Marsh, and was subscribed thereto by like order of the said Board of Directors, and in the presence of him, the said Julien J. Mason.

(Signed) ISAAC F. WILLIAMS,
258 Commissioner of Deeds,
New York City.

EXTRACT FROM THE MINUTES OF THE REGULAR MEETING OF THE BOARD OF DIRECTORS OF THE BANKERS SURETY COMPANY, HELD AT THE COMPANY'S OFFICE IN THE CITY OF CLEVELAND, OHIO, ON TUESDAY, NOVEMBER 29TH, 1904. 259

"There being a quorum of the directors present,
"Mr. Goulder presiding.

"The following preamble and resolution was duly
"moved and seconded and unanimously adopted:

"WHEREAS, The Bankers Surety Company, in
"order to facilitate its business of becoming surety
"on bonds, is required to execute bonds in places
"other than the Home Office, upon application 260
"being made for same; and,

"WHEREAS, this Board is authorized by the By-
"Laws of this Company to appoint Third Vice
"Presidents and Assistant Secretaries as in their
"judgment the interest of the Company require;
"and,

"WHEREAS heretofore to wit: upon the 31st day
"of March, 1903, Julien J. Mason and Newbold L.
"R. Edgar were duly elected Third Vice Presidents,
"and Julien J. Mason, Armitage Mathews and
"Herbert L. Marsh were duly elected Assistant
"Secretaries for the State of New York to hold 261
"their respective offices during the pleasure of the
"Board with only certain powers; and,

"WHEREAS it is now desired to terminate the
"aforesaid official tenures, effect changes in the per-
"sonnel of the Company's representation in New
"York and amend the authority of such repre-
"sentative.

"THEREFORE BE IT RESOLVED, that this Board do
"proceed to elect two Third Vice Presidents and
"two Assistant Secretaries for the State of New

262 " York, to hold their respective offices during the
" pleasure of the Board, with only the following
" powers, to wit:

" That either of said Third Vice Presidents may,
" jointly with any of the said Assistant Secretaries in
" the State of New York, subject to the exception,
" that no one person shall, in executing any bond,
" obligation or undertaking, act both as Third Vice
" President and as Assistant Secretary, sign, seal,
" acknowledge and deliver for and on behalf of said
" The Bankers Surety Company in the State of
" New York, subject to the following condition:

"A. Any and all bonds, obligations and under-
263 " takings required in judicial proceedings in any
" and all courts sitting or held in the State of New
" York, including U. S. Circuit and District Courts,
" also all bonds, obligations and undertakings re-
" quired in any and all proceedings in any Probate,
" Orphan's or Surrogate's Courts sitting or held in
" the aforesaid State, and including also the execu-
" tion of bonds of indemnity to sheriff or sheriffs in
" the aforesaid State.

" PROVIDED HOWEVER, No such bond shall be in a
" penalty of more than Fif tyThousand Dollars ($50,-
" 000.00).

264 "B. Any and all bonds required by the United
" States Government to be filed with the Internal
" Revenue Bureau of the Treasury Department for
" the proper conduct of any tobacco or spirit manu-
" facturing business, including warehousing bonds,
" transportation bonds, transportation for ware-
" housing bonds, export bonds, distillers' annual
" bonds, tobacco and cigar manufacturer's bonds
" and any and all other bonds which may be re-
" quired either by the Revenue Statutes or the In-
" ternal Revenue Bureau of the Treasury Depart-
" ment of the United States, covering also the exe-

" cution of such consents as may be necessary in 265
" connection therewith;

" PROVIDED HOWEVER, No such bond shall be in a
" penalty of more than One Hundred Thousand
" Dollars ($100,000.00).

" C. Any and all bonds guaranteeing the faithful
" performance of contracts for the construction of
" any work or improvement, either public or private,
" or for the furnishing of any supplies, which may
" be required by private contract, the statutes of
" the United States or of any State, or by the rules
" or ordinance of any Board, Commission or Public
" Corporation, or by the head of any of the Exec-
" utive Departments of the United States, or of any 266
" State or Public Corporation,

" PROVIDED HOWEVER, No such bond shall be in a
" penalty of more than Twenty-Five Thousand Dol-
" lars ($25,000), nor shall this authority be held to
" cover the execution of bonds which guarantee
" leaseholds, charter parties, the payment of rentals
" or instruments of this nature.

" D. Any and all bonds required to be filed by
" public officers elect (except treasurers, sheriffs,
" constables, and officers collecting taxes) in quali-
" fying for office; the said bonds being conditioned
" for the faithful discharge of their duties and ac- 267
" counting for and paying over the funds coming
" into their hands as such officers or in such terms
" as by statute required;

" PROVIDED HOWEVER, No such bond shall be in a
" penalty of more than Twenty-Five Thousand Dol-
" lars ($25,000.00).

" E. Any and all bonds required by the State of
" New York or any City, Town or County in said
" State, to be given or filed in any City, Town or
" County of said State under the provision of the

268 " liquor law of the State of New York (Laws of 1896,
" Chapter 112, as amended by the laws of 1897,
" Chapter 312) and the various acts amendatory
" thereof and supplementary thereto, or pursuant
" to Laws or Ordinances regulating the granting of
" permits for the conducting of any business, keeping
" of explosives, &c., meaning to include herein all
" such instruments commonly known as 'permit
" bonds' or 'license bonds.'

" PROVIDED HOWEVER, No such bond shall exceed
" in penalty the sum of Five Thousand Dollars
" ($5,000.00).

" CONDITION.—All such bonds, obligations and
269 " undertakings shall be executed in the name of The
" Bankers Surety Company by either of said Third
" Vice Presidents jointly with any one of said As-
" sistant Secretaries as hereinbefore provided and
" the seal of said Company shall be hereto attached;
" and

" Any and all such bonds, obligations and
" undertakings shall be binding upon said The
" Bankers Surety Company to all intents and pur-
" poses as fully as if done by the President and
" Secretary of the Company in their own proper
" persons in its behalf.

" The chair then announced that nominations for
" the two Third Vice Presidents and the two As-
270 " sistant Secretaries for the State of New York, pur-
" suant to the foregoing resolution, were in order;
" whereupon Julien J. Mason and Henry White were
" duly nominated for such Third Vice Presidents,
" and Julien J. Mason and Herbert L. Marsh were
" duly nominated for such Assistant Secretaries.

" There being no further nominations, on motion
" duly seconded and unanimously carried, the Secre-
" tary was authorized to cast the ballot on behalf of
" the Directors present for the beforementioned
" nominees. The Secretary thereupon cast the
" ballot and said nominees were declared to have
" been unanimously elected to their respective
" offices."

I, P. W. HARVEY, Secretary of The Bankers Surety 271
Company, aforesaid, hereby certify that I have compared the foregoing extracts of the minutes of the meetings of the Board of Directors of said Company, aforesaid with the originals thereof as recorded in the minute book of said Board of Directors of said Company, and that the same are true and correct extracts therefrom and include all the proceedings of said meetings in reference to the officers therein referred to.

IN TESTIMONY WHEREOF, I hereunto subscribe my name as such Secretary, and have hereunto affixed the seal of said Company this 13th day of January, A. D. 1906.
272

P. W. HARVEY,
Secretary.

[SEAL.]

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THE BANKERS SURETY COMPANY

OF

CLEVELAND, OHIO,

SHOWING FINANCIAL CONDITION DECEMBER 31, 1905.

PAR VALUE.	*Assets.*	MARKET VALUE.
$95,000 00	United States Coupon Bonds, 3 per cent.....	$98,562 50
40,000 00	United States Registered Bonds, 3 per cent.....	41,500 00
275 25,000 00	City of Dayton, Ohio, School Bonds, 4 per cent.	26,375 00
25,000 00	City of Cleveland, Ohio, Sewer Bonds, 4 per cent.	26,500 00
39,000 00	Lakewood, Ohio, Sewer Bonds, 4 per cent.....	39,000 00
4,500 00	Glenville, Ohio, Sewer Bonds, 5 per cent.....	4,581 00
20,000 00	Belmont County, Ohio, Sewer Bonds, 4 per cent.	20,600 00
3,000 00	Franklin County, Ohio, Bonds, 4 per cent.....	3,060 00
19,000 00	City of Cambridge, Ohio, Bonds, 4 per cent.....	19,807 50
276 14,000 00	Guernsey County, Ohio, Bonds, 4 per cent.....	14,252 00
1,175 00	Coal and Iron National Bank (Cleveland, Ohio), Stock	1,175 00
5,000 00	Union National Bank (Cleveland, Ohio), Stock	9,500 00
5,000 00	Central National Bank (Cleveland, Ohio), Stock	9,500 00
10,000 00	National Commercial Bank (Cleveland, Ohio), Stock	19,000 00

Par Value.	*Assets.*	Market Value.	277
$5,000 00	Market National Bank (Cleveland, Ohio), Stock.	$5,000 00	
5,000 00	First National Bank (Cleveland, Ohio), Stock.	11,400 00	
10,000 00	Steel Steamship Gold Bonds, 5 per cent.....	10,000 00	
35,000 00	Goodrich Transportation Co. Bonds.....	36,026 00	
5,000 00	Howell Davis Brant Co. Bonds.....	5,000 00	
22,000 00	Tuscarawas Railway Co. Bonds.....	21,560 00	
	Interest accrued.....	5,216 97	278
	Bills Receivable.....	7,465 21	
	Furniture and Fixtures....	4,882 94	
	Outstanding Premiums less Commissions.....	37,264 08	
	Cash in Office and Banks	76,049 54	
	Collateral Loans.....	26,875 00	
	Mortgage Loans.....	75,462 00	
	Real Estate.....	10,000 00	
		$665,614 74	

Liabilities.

Capital Stock.....		$500,000 00	
Reserve for Unadjusted Claims.....		41,410 33	279
Agents' Credit Balances.....		125 60	
Re-Insurance Reserve....	$79,286 92	124,078 81	
Surplus.....	44,791 89		
		$665,614 74	

I, P. W. Harvey, Secretary of the Bankers Surety Company, do hereby certify that the foregoing is a true statement of the assets and liabilities of the said Company on the date above stated. In testimony whereof, I have hereunto set my hand

280 and affixed the seal of the Company this 13th day of February, 1906.

P. W. HARVEY,
Secretary.

Sworn to and subscribed before me this 13th day of February, 1906.

C. C. LOWE,
Notary Public.

(Endorsed)—United States Circuit Court, For the Southern District of New York.—J. Willcox Brown, Complainant, agst. The Equitable Life Assurance Society of the United States, De-
281 fendant.—Bond for Costs.—Issued by The Bankers Surety Co., 170 Broadway, New York City.—Battle & Marshall, Attys. for Complt., 170 Broadway, N. Y. City.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District, New York.—Filed Feb. 9, 1906.—John A. Shields, Clerk.

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UNITED STATES CIRCUIT COURT, 283

SOUTHERN DISTRICT OF NEW YORK.

J. WILLCOX BROWN,
Complainant,

AGAINST

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant.

In Equity.
No.

284

Citation on Appeal.

UNITED STATES OF AMERICA, ss.:

TO THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES:

You are hereby cited and admonished to be and appear at a Term of the United States Circuit Court of Appeals for the Second Circuit, to be held in the Post Office Building, in the Borough of Manhattan, City of New York, in the District and Circuit above named, on the 6th day of March, 1906, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein J. Willcox Brown is 285
appellant and you are respondent, to show cause, if any there be, why the judgment herein should not be corrected, and speedy judgment should not be done in that behalf.

Witness, Honorable MELVILLE H. FULLER, Chief Justice of the United States, this 9th day of February, 1906.

E. H. LACOMBE,
Judge of the Circuit Court.

(Endorsed)—United States Circuit Court of Appeals for the Second Circuit.—The Equitable Life

286 Assurance Society of the United States, Plaintiff, against J. Willcox Brown, Defendant.—Citation.—Copy of the within Citation received February 16, 1906. Alexander & Green, Solicitors for Defendant.—U. S. Circuit Court, Southern District of New York.—Filed Feb. 16, 1906.—John A. Shields, Clerk.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of
287 the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to ninety-one, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled J. Willcox Brown, Complainant-Appellant, against The Equitable Life Assurance Society of the United States, Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23d day of February, in the year of our Lord one thousand nine hundred
288 and six, and of the Independence of the said United States the one hundred and thirtieth.

JOHN A. SHIELDS,
Clerk.

[SEAL.]

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held in the Court House in the Post Office Building, in the Borough of Manhattan, City of New York, on the 13th day of March, 1906. 289

Present—Hon. WILLIAM J. WALLACE.

J. WILLCOX BROWN,
Complainant,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.
Defendant.

} In Equity. 290

On reading and filing the annexed stipulation and consent signed by the solicitors for the respective parties hereto, it is

Ordered, that Exhibits C and D of the appeal herein need not be printed by the appellant in his printed record on appeal to this Court, but in lieu thereof copies of the said Exhibits C and D as published by the Spectator Company, 135 William Street, New York City, may be used upon the argument of the appeal, and that nine copies of each submitted to this Honorable Court at that time, with the same force and effect as if the said exhibits had been duly printed and made a portion of the printed case on appeal herein, and that an order to that effect may be entered by the solicitors for either party without notice. 291

Enter.

WM. J. WALLACE.

292 UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND DEPARTMENT.

J. WILLCOX BROWN,
Complainant,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED
293 STATES,
Defendant.

It is hereby stipulated and consented by and between the solicitors for the complainant and the defendant herein that Exhibits C and D, respectively report of the Investigating Committee of the Board of Directors of the Equitable Assurance Society of the United States, H. C. Frick, Chairman, submitted to the Board of Directors and published June 2nd, 1905, and preliminary report on the investigation into the management of the Equitable Assurance Society of the United States made to the Governor of the State of New
294 York by the Superintendent of Insurance as of June 21, 1905, with addendum covering matters referred to therein, both reports being published by the Spectator Company, 135 William street, New York City, need not be printed by the appellant in his printed record on appeal to this Court, but as was the case at the time of the argument of the demurrer herein before Mr. Justice Hazel, in the United States Circuit Court, Southern District of New York, that copies of the said Exhibits C and D as published by The Spectator Company aforesaid may be used upon the argument of the appeal and

nine copies of each be submitted to this Court at 295
that time with the same force and effect as if the said exhibits had been duly printed by the appellant and made a portion of his printed case on appeal herein, and that certification of the said exhibits is hereby waived and an order as to the premises be entered by either party without notice.

Dated New York, March 6th, 1906.

DOS PASSOS BROS.,
BATTLE & MARSHALL,
JOSEPH DE F. JUNKIN,
Solicitors for Complainant.

ALEXANDER & GREEN,
Solicitors for Defendant. 296

(Endorsed)—U. S. Circuit Court of Appeals, Second Circuit.—J. Willcox Brown, Complainant, against The Equitable Life Assurance Society of the United States, Defendant.—Original order, stipulation and consent.—Battle & Marshall, attorneys for Complainant, No. 170 Broadway, Borough of Manhattan, New York City.—United States Circuit Court of Appeals for the Second Circuit.—Filed Mar. 13, 1906.—William Parkin, Clerk.

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REPORT

OF THE

INVESTIGATING COMMITTEE

OF THE

BOARD OF DIRECTORS

OF

The Equitable Assurance Society of the United States

H. C. FRICK, CHAIRMAN

SUBMITTED TO THE BOARD OF DIRECTORS

AND

PUBLISHED JUNE 2, 1905

THE SPECTATOR COMPANY
135 WILLIAM STREET
NEW YORK

REPORT

OF THE

INVESTIGATING COMMITTEE

OF THE

BOARD OF DIRECTORS

OF

The Equitable Life Assurance Society of the United States

H. C. FRICK, CHAIRMAN

Submitted to the Board of Directors and Published June 2, 1905

The following is the full text of the Report of the Frick Investigating Committee:

To the Board of Directors of the Equitable Life Assurance Society of the United States:

Sirs: The undersigned, members of the committee appointed to "thoroughly investigate and report upon the present management of the society," beg leave to submit the following:

On the 2d of February, 1905, James W. Alexander, president; Gage E. Tarbell, second vice-president; George T. Wilson, third vice-president; William Alexander, secretary, and thirty-four other officers of the Equitable Life Assurance Society of the United States, presented to the board of directors of the society a petition setting forth "their views and opinions regarding the future management of the affairs of the society, the conservation of its business, and the due administration and protection of the trust funds in its charge."

In this petition it is also recited that the society was organized in 1859, that its charter expressly provided that its insurance business should be conducted upon the mutual plan, that its capital stock was $100,000 divided into 1,000 shares of the par value of $100 each, that the dividends on the capital stock were limited to 7 per cent. per annum, that all the net earnings and receipts above the dividends should be accumulated, and that "the corporate powers of the society should be vested in the board of directors, and that such board should consist of fifty-two persons, each of whom was to be the proprietor of at least five shares of the capital stock." The petition then set out the clause of the charter of the society wherein it is provided that in the election of directors every stockholder should be entitled to one vote for every share of stock held by him, and that at any time after the organization of the society the board of directors might, by a vote of three-fourths of all the directors, provide that each life policyholder, who shall be insured for not less than $5,000, shall be entitled to one vote at the annual election of directors, such vote to be given personally

and not by proxy. The petition then recited that the number of policyholders and beneficiaries of the society now exceeds 500,000, and that the accumulations held by the society amount to over $410,000,000. The petitioners then represented that from their practical experience in the conduct of the society's business "we have become convinced that its continued welfare and progress and the due administration and protection of the trust funds in its charge render a change necessary, and that it is incompatible with present public opinion as well as with the interests of the society and its beneficiaries that the policyholders, as the real parties in interest, should continue to be without any voice in the administration of these funds, but that the entire power of selecting directors should be vested in and exercised solely by the holder for the time being of a majority of the society's nominal capital stock." The petitioners then recited that they had consulted counsel as to their duty as officers of the society and as to the powers of the directors and were advised as follows: "First. That it is our duty to acquaint the board of directors with our views and judgment and to urge the recommendations which we now submit. Second. That under the charter there is full power vested in the board of directors to confer voting powers upon the class of policyholders mentioned above." The petition concluded with a recommendation that the board of directors "take the necessary action so as to provide that each policyholder, insured in not less than $5,000, shall be entitled to one vote at the annual election of directors, and that the necessary legal steps be taken to secure power to further provide for the extension of this voting right to all classes of beneficiaries."

Five days later, to wit, on the 7th of February, 1905, being the day prior to the annual meeting of the society, which was held on the 8th of February, 1905, these same gentlemen presented a supplemental petition to the board of directors of the society, in which they recited that, "We deem it proper to state that a copy of such petition [the original] was furnished to Mr. Hyde on the 3d instant as the representative and owner of a majority of the capital stock of the society." They then added in this supplemental petition: "We also deem it proper to add that, in our opinion, after the most careful and anxious consideration of the subject, the reelection of Mr. Hyde as vice-president and acting president in the absence of the president, with all the powers he has exercised, would be most prejudicial to the welfare and progress of the society and the conservation of the trust funds held for the benefit of our policyholders. Mr. Hyde's prominence in various ways and his acts as vice-president are such as to tend to provoke criticism of the society, to create misgivings as to the conservatism of its management, and to injure its business as an institution which has been uniformly held out to the public as conducted solely on the mutual plan for the benefit and protection of its policyholders."

This imported into the petition an entirely new request to the board of directors.

As matters stood on February 8, 1905, the day of the annual meeting, the petitioning officers of the society had asked for three things:

(1.) That the $5,000 policyholders be at once enfranchised.

(2.) That legal steps be taken to enfranchise "all classes of beneficiaries."

(3.) That Hyde should not be reelected vice-president.

We will now proceed to show, as a part of the history of the case, what action was taken by the board of directors upon these requests up to the time of the reelection of the present management whose acts are now under investigation.

At the annual meeting held on February 8, 1905, the president of the society submitted to the board of directors the petition of February 2, 1905, and the supplemental petition of February 7, 1905, hereinbefore referred to, together with the opinion of counsel, obtained by the petitioners, relative to the legality of the mutualization of the society. At this meeting a proposed new charter and declaration for the society was submitted, and a motion made that the president and secretary of the society be authorized and directed to execute the proposed amended charter and take all necessary steps to validate the same. This motion was, by the unanimous vote of the board, laid upon the table. Thereupon a committee of the board was appointed to inquire into the matters and documents submitted by the president, namely, the petition of February 2, 1905, the amended petition of February 7, 1905, and the opinion of counsel upon the subject-matter of said petitions, with instructions to report to the board in one week. This was the unanimous action of the board. Whereupon the meeting adjourned until February 16, 1905.

In the meanwhile, and prior to the date to which the meeting of the board was adjourned, to wit, on the 15th of February, 1905, Mr. James W. Alexander, the president of the society, addressed a communication to the committee appointed by the board, in which he discusses at length the proposition of mutualization proposed in the petitions of February 2 and 7, 1905, maintaining as a part of his argument for mutualization that the question of mutualization "has now become doubly acute because of the open, aggressive, and misguided emphasis and outward assertion given to the fact of his stock control by Mr. James H. Hyde, the vice-president of the company."

This communication of February 15th likewise set out at length the argument of Mr. Alexander for mutualization based upon his allegations of shortcomings and misdoings upon the part of Mr. Hyde as an individual and as an officer of the company, of whom Mr. Alexander said: "I think his errors, notwithstanding their baneful effect upon the society and their grave menace to its future prosperity, arise from a fundamentally wrong condition which I am hopeful that the board of directors of this society will, in their wisdom, correct."

At the adjourned meeting of the board of directors held on the 16th of February, 1905, the board adopted a scheme of mutualization, as detailed in the report of the committee of directors submitted to the meeting, and reelected all of the existing officers of the society, including the vice-president, against whom the protest had been lodged by the president and other officers of the society. At the same meeting the former executive committee, with the addition of Mr. H. C. Frick, was elected with Mr. James H. Hyde as its chairman; and the former finance committee, with the addition of Mr. H. C. Frick, which consists of the members of the executive committee and one additional person. The former members of the other standing committees were also reelected, to wit, the committees on agen-

cies, on insurance, and on accounts. Thus the board of directors of the society disposed of the three propositions presented in the petition of the officers of the company and in their amended petition, as hereinbefore stated, by adopting a scheme of mutualization, and by disposing of the protest against the reelection of Mr. Hyde by reelecting him.

The scheme of mutualization adopted by the board of directors subsequently underwent changes by the action of the board. It is not necessary, however, for the committee to now pursue the history of these changes, or to discuss their merits, as this was a matter with which the board of directors dealt directly, and whose action in respect thereto is now pending before the insurance commissioner and the court.

The charges against Mr. Hyde were followed by charges made by him against Mr. Alexander, the president of the society. These charges and countercharges, in which other officers of the society were included, raised serious and radical questions affecting the management of the society, which resulted in the appointment of this committee by a resolution of the board of directors passed on the 6th of April, 1905, under the terms of which Messrs. Bliss, Mills, Frick, Harriman, Ives, Hill, and Ingalls were appointed to constitute the committee and were "charged with the duty of thoroughly investigating and reporting upon the present management of the society; said committee to select its chairman and adopt measures of procedure."

Messrs. Hill and Mills immediately after their appointment gave notice of their inability to serve upon the committee and the duties of the committee have been so far performed by the remaining members.

The committee held its first meeting April 7, 1905, and elected a chairman, who was directed to employ a secretary.

As the committee was appointed to investigate the management of the society, the primary inquiry is what constitutes the management, where it is lodged by law, and how it may be lawfully exercised.

The charter of the society contains these words: "The corporate powers of said company shall be *vested* in a board of directors and shall be *exercised* by them and such officers and agents as they may appoint and from time to time empower."

The exercise of the corporate powers of the company and the acts incident thereto constitute its management, and it is this management that the directors empowered the committee to investigate.

Referring again to the charter quoted above, it will be observed that while the corporate powers are vested in the directors, the exercise of those powers, that is, the management of the company's affairs, is committed to the directors and such officers and agents as they may appoint. So that in the last analysis it comes to this, that this committee's duty is to investigate the management by the directors and likewise the management by the officers. This severance or division of the committee's duty is made for many practical reasons besides convenience, and especially for the purpose of locating the responsibility for wrong-doing in specific cases of mismanagement.

The first step, therefore, is to determine how, under the charter and by-laws of the society, the exercise of the corporate powers and the acts

incidental thereto have been distributed and exercised, in order that each specific case of wrong-doing may be referred easily to the individual or body immediately responsible.

The charter of the society provides that the board of directors shall consist of fifty-two persons, each of whom shall be the proprietor of at least five shares of the capital stock of said society, but it contemplated that the board might diminish its number to not less than twenty-four members. The power to reduce its number was never exercised, and from the organization of the society to this time the board of directors has been composed of fifty-two persons. The charter also empowers the board to declare, by by-law, what number of directors, not less than seven, shall constitute a quorum for the transaction of business. Pursuant to this authorization, the board has provided by a by-law that nine directors shall constitute a quorum for the transaction of business. The charter vested all the corporate powers in the board of directors, but provided that such powers should be exercised by them and by such officers and agents as they might appoint, and from time to time empower. Pursuant thereto the board created five standing committees, namely:

(1) A finance committee.
(2) An executive committee.
(3) A committee on agencies.
(4) A committee on insurance.
(5) A committee on accounts.

By-law 19 provided that the finance committee should consist of ten directors and the president (six of whom should be a quorum), and should superintend the making of investments by the executive committee; and it required the executive committee to report to the finance committee at each meeting the investments made in the interval, and authorized the finance committee to direct a change of investments on securities. It also required the finance committee to superintend the manner in which the accounts should be kept, and all matters connected with the finances and expenses of the society; and that it, or through the executive committee, or through such persons as it might designate, audit all bills, and examine and check the cash payments with the vouchers.

By-law 20 provided that the executive committee should consist of the president, the vice-president, the comptroller, the chairman of the finance committee, and not less than five other directors (four of whom should constitute a quorum) to act as an advisory committee to the president in all of the affairs of the society and to have special charge of the investment of its funds, including the purchase and sale of securities, and loans on the same, and investments on bond and mortgage; and should during the intervals when the finance committee was not in session have all the powers of the board of directors; to supervise the condition, security, and productive character of assets, to provide against danger of loss, to invest and reinvest in productive assets; to meet three times in each week for the purpose of advising and consulting with the president; to report purchases, loans, and other investments made by them to the finance committee.

By-law 21 provided that the committee on insurance should consist of

five directors to consult and advise with the officers relative to insurance, and the adjustment and settlement of claims for losses.

By-law 22 provided that the committee on agencies should consist of five directors to consult and advise with the officers in all matters relative to the appointment, management, and removal of agents, and to fix their compensation.

By-law 23 provided that the committee on accounts should consist of five directors to examine and audit accounts now audited by the committee on finance or under its direction.

By-law 28 provided that "all investments or sales of stocks or bonds shall be in the name of the society."

The following officers in the society, also, have been established, namely, a president, a vice-president, a second, third, and fourth vice-president, a secretary, an assistant secretary, an actuary, a comptroller, a treasurer, an assistant treasurer, an auditor, a superintendent of agencies, a registrar, and two resident medical directors.

By-law numbered 6, after providing that the president shall preside at all meetings of the directors and shall be ex officio a member of all standing committees, further provides that he "shall have the general direction and superintendence of the affairs of the society," and that he "shall appoint all clerks and other employees not appointed by the board of directors."

By-law numbered 7 provides that "the vice-president and the second, third, and fourth vice-presidents shall *assist* the president." Each of them is, therefore, subordinate to and under the control and direction of the president except when the latter is absent, sick, or unable to perform the duties of his office, when, this same by-law provides, the vice-president shall perform the duties of the president.

Of the remaining officers of the society it is sufficient to say that they are charged with the duties that generally appertain to positions of the kind held by them, and that they are under the direction of the president of the society.

Thus the execution of the society's powers was distributed among the committees and officers and an organization effected for the prosecution of the society's business.

This committee's first act was to determine along what lines it would seek for the information which would determine the character of the management of the society, and at its first meeting the chairman was instructed to prepare a communication to President Alexander asking for certain information regarding the management. On April 8th the committee announced, through a letter of its chairman to Mr. Alexander that it intended "to investigate the *entire management* of the society," but "in view of certain charges and countercharges made by or against certain officers, directors, and trustees," the committee called for specific data and information embodied in eleven different requests contained in the letter, and then by a general request asked for any other information, relevant to the scope of the committee's powers, touching the management of the society.

Since April 8th certain other charges and countercharges have been made by and against officers and directors, concerning which the committee pursued its original course of demanding the proofs. In the letter of April 8th to Mr. Alexander he was requested to send a copy of the letter "to all the officers and heads of departments of the society," and by letter of the chairman of the committee of April 12th, Mr. Alexander was requested to instruct those preparing information to furnish such information directly to the chairman.

The committee early determined that the gravest charges affecting the management of the society were those affecting its higher, and, therefore, more responsible, officers, and the committee therefore decided to first secure information showing, or tending to show, malfeasance, or nonfeasance upon the part of any director or high official of the Equitable Society, and such information as might discover radical faults, if any, in the practices and theory of the conduct of the society's business.

Up to April 25th no specific information of value having been furnished in response to the letter of April 8th, the committee directed its chairman to call Mr. Alexander's attention to that fact by transmitting to him the committee's resolution of April 25th. This the chairman did. The resolution was as follows:

"Resolved, That the committee view with surprise and regret the fact that to this date none of the information asked for from the officers of the Equitable Society, in the letter addressed to the president of the society by the chairman of the committee on April 8, 1905, has been furnished to the committee; and be it further

"Resolved, That this committee meet on Friday, April 28th, at 10.45 a. m., at which time the committee hopes and expects to be in receipt of definite answers to at least a part of the questions asked in its letter of April 8, 1905."

The response to this was two letters from Mr. Alexander, one dated April 26th, the other April 27th, both explanatory of the delay. These replies not being satisfactory, the chairman, on April 27th, addressed to Mr. Alexander a letter in which he said:

"Your letters of April 26th and 27th are so indefinite as to the time when your own statement affecting the management of the society will be forthcoming, that I am constrained to again direct your attention to the pressing necessity of something material being furnished. Delay in the work of this committee must inevitably result in harm to the interests of the society, and it seems reasonable that those making serious charges against any part of its management should immediately respond by furnishing the data upon which such charges rest. The committee feels that the gravest charges are those affecting the higher, and therefore more responsible, branches of the management, and, therefore, without abating or withdrawing any of the requests for information covered by the committee's letter of April 8, 1905, I earnestly desire you to at once put the committee in possession of all information you now have showing, or tending to show, malfeasance or nonfeasance upon the part of any director or high official of the Equitable Society."

On the same date, April 27, the chairman also addressed the following letter to Mr. Hyde:

"DEAR SIR: I again call your attention, as I have done several times verbally, to my letter of April 17, 1905, in which I requested you 'to furnish me the names of those comprising the syndicate or syndicates known as "James H. Hyde and Associates," and a complete statement of its or their operations; how much money was divided, and the amount received by each member, and any other information in connection with said syndicates as would enable the investigating committee to thoroughly investigate all matters in connection with them.'

"You have several times verbally stated to me that the information would be forthcoming in a few days. The committee desires to do its work expeditiously, thoroughly, and judicially, and is presently desirous of information affecting the higher, and therefore more responsible, branches of the management.

"Therefore, without abating or withdrawing any of the requests for information you may have, as covered by the committee's letter of April 8, 1905, I earnestly desire you to at once put the committee in possession of the information requested in my letter of April 17, hereinbefore quoted.

"Yours very truly,

"H. C. FRICK,

"*Chairman.*"

The chairman's letter of April 17, referred to in this letter to Mr. Hyde, was written to him upon the receipt of Mr. Hyde's letter of April 15, in which he stated that he (Mr. Hyde), President Alexander, and others had been members of a syndicate known as James H. Hyde and Associates, which "had been underwriters of a number of banking issues of securities," some of which had been purchased by the Equitable Society.

In Mr. Hyde's letter of April 15 he admitted that he had returned to the society $61,446.92, the total profits, with interest thereon, which he personally had realized through the operations of the syndicate referred to by him, which sum he asks to be disposed of "as the propriety of these transactions might be finally determined."

To these letters of April 27, Messrs. Hyde and Alexander replied; Mr. Alexander by further explanation of the reasons for his delay in furnishing the committee information; Mr. Hyde by furnishing:

(1.) A statement of the syndicate or syndicates known as "James H. Hyde and Associates" and its operations.

(2.) A statement of his business relations with the corporations in which the society is a stockholder.

(3.) A list of the employees who are related to Mr. Hyde.

(4.) A history of the Mercantile Safe Deposit Company since its creation, accompanying which were copies of all the leases of the premises occupied by the said company.

In Mr. Hyde's letter he states: "I embody herewith the information which you request so far as it relates to any transactions in which the Equitable Life Assurance Society had any interest directly or indirectly."

June 11, 1002.

METROPOLITAN STREET RAILWAY FOURS OF 1902.

Syndicate allotment of $1,000,000 from Kuhn, Loeb & Co., to James H. Hyde and Associates. Kuhn, Loeb & Co. purchased these bonds from the railway company at 94 and accrued interest. The total profit from this syndicate was $30,210.38, divided as follows:

	Allotment.	Profit.
Equitable Trust Company	$100,000	$3,021 03
Western National Bank	100,000	3,021 03
Commercial Trust Company, Philadelphia	100,000	3,021 03
Franklin National Bank, Philadelphia	100,000	3,021 03
V. P. Snyder	50,000	1,510 52
H. C. Deming	50,000	1,510 52
G. H. Squire	100,000	3,021 03
James W. Alexander	150,000	4,531 58
James H. Hyde	150,000	4,531 58
*W. H. McIntyre	100,000	3,021 03
Total		$30,210 38

On June 18, 1902, the executive committee recommended the purchase of $1,000,000 of these bonds at 97½ and interest.

Messrs. Alexander, Snyder, Deming, Squire, and Jordan were present at that meeting, but Mr. Hyde was not. The vote was unanimous.

On June 20, 1902, the purchase of same was reported to the committee at 97½ and interest, less ½ per cent., and on July 6, 1902, the bonds were delivered to the society by Kuhn, Loeb & Co.

The society still holds $1,000,000 of these bonds; market price, April 24, 1905, 91¼ offered.

October 28, 1903.

PHILADELPHIA, BALTIMORE AND WASHINGTON 4 PER CENT. BOND AND LONG ISLAND RAILROAD 4 PER CENT. BOND SYNDICATE.

Syndicate allotment of $000,000 from Kuhn, Loeb & Co. to James H. Hyde and Associates. Kuhn, Loeb & Co. purchased these bonds from the railroad as follows:

PHILADELPHIA, BALTIMORE AND WASHINGTON AT PAR AND INTEREST.

LONG ISLAND RAILROAD REFUNDING FOURS AT 94 AND INTEREST.

The total profit from this syndicate was $11,930.55, divided as follows:

	Allotment.	Profit.
James W. Alexander	$150,000	$2,982 54
James H. Hyde	150,000	2,982 64
George H. Squire	150,000	2,982 64
*W. H. McIntyre	150,000	2,982 64
Total		$11,930 55

*Not a member of executive or finance committee.

On October 30, 1903, at a meeting of the executive committee, at which were present Messrs. Alexander, Wheelock, Depew, Squire, Snyder, Deming, Baldwin, and Jordan, it was resolved that the matter of subscribing to the syndicate formed by Kuhn, Loeb & Co. for the $10,000,000 Philadelphia, Baltimore and Washington new 4 per cent. bonds and $10,000,000 Long Island Railroad refunding 4 per cent. bonds (the latter unconditionally guaranteed as to principal and interest by the Pennsylvania Railroad) be left with the president and vice-president, with power. Unanimously approved.

On November 18, 1903, at a meeting at which were present Messrs. Wheelock, Squire, Snyder, Deming, and Jordan, the committee recommended the purchase of $1,000,000 of these Philadelphia, Baltimore and Washington bonds from Kuhn, Loeb & Co., with the understanding that if, during the life of the syndicate, these bonds should sell at a lower figure, the society to have the benefit of such decline. The purchase of $1,000,000 to be at 104 and interest. The vote was unanimous.

On November 20, 1903, at a meeting at which were present Messrs. Wheelock, Squire, Snyder, Deming, Baldwin, Alexander, Hyde, and Jordan, the purchase of this $1,000,000 of these bonds was reported at 104 and interest.

On January 8, 1904, at a meeting attended by both Mr. Hyde and Mr. Alexander, the purchase of $1,000,000 of these bonds was reported at 104 and interest, less 1½ per cent. on this and the former purchase. These bonds (Philadelphia, Baltimore and Washington) were delivered to the society and sold at a profit of $71,862.

On January 27, 1904, at a meeting at which were present Messrs. Wheelock, Depew, Squire, Snyder, Deming, Baldwin, and Alexander, the committee recommended the purchase from Kuhn, Loeb & Co. of $1,500,000 Long Island Railroad unified 4s, at 98½ and interest, Kuhn, Loeb & Co. to take $500,000 of the old unified 4s held by the society in part payment at 98½ and interest. The vote was unanimous.

On January 29, 1904, at a meeting at which were present Messrs. Wheelock, Squire, Snyder, Deming, Baldwin, Alexander, and Jordan, the committee recommended the purchase of $1,000,000 of these bonds instead of $1,500,000. The vote was unanimous.

On February 1, 1904, at a meeting not attended by Mr. Hyde, but at which Mr. Alexander was present, the purchase of $1,000,000 of these bonds at 98½ and interest was reported.

On February 10, 1904, at a meeting at which were present Messrs. Wheelock, Squire, Snyder, Baldwin, Alexander, Hyde, and Jordan, the committee recommended an additional purchase of $400,000 Long Island Railroad guaranteed 4s at 98½ and interest. The vote was unanimous.

On February 15, 1904, at a meeting of which were present Messrs. Wheelock, Squire, Snyder, Deming, Baldwin, and Jordan, the purchase of $404,000 Long Island Railroad guaranteed 4s at 98½ and interest was reported.

On February 10, 1904, at a meeting at which were present Messrs. Wheelock, Squire, Snyder, Baldwin, Alexander, Hyde, and Jordan, the committee recommended the exchange of $600,000 Long Island Railroad unified 4s for a like amount of the guaranteed 4s. The vote was unanimous.

On February 15, 1904, at a meeting not attended by either Mr. Hyde or Mr. Alexander, it was reported as a transaction that it had been arranged to receive from Kuhn, Loeb & Co. $596,000 Long Island refunding 4s in exchange for $596,000 unified 4s.

On December 2, 1904, at a meeting attended by both Mr. Alexander and Mr. Hyde, the committee recommended the sale of $250,000 Long Island refunding 4s at 101 flat.

On December 5, 1904, at a meeting attended by both Mr. Hyde and Mr. Alexander, the sale of $750,000 Long Island refunding 4s was reported at 101¾, 101⅞, and 102 flat; the committee recommended the sale of $600,000 Long Island Railroad refunding 4s at 102 flat.

On December 7, 1904, at a meeting not attended by either Mr. Alexander or Mr. Hyde, the sale of $750,000 Long Island refunding 4s at 102 flat was reported.

On these sales made during December, 1904, the society made a profit of $40,042.

On March 8, 1905, at a meeting attended by Mr. Alexander, but from which Mr. Hyde was absent, the committee recommended the sale of $250,000 Long Island Railroad refunding 4s at 101 and interest—101.38 flat.

On March 10, 1905, at a meeting attended by both Mr. Hyde and Mr. Alexander, the sale of $600,000 of above bonds at 101⅛ flat—101¼ and interest—was reported.

These $600,000 were sold at a profit of $18,071.

October 28, 1904.

OREGON SHORT LINE REFUNDING MORTGAGE FOUR PER CENT. 25-YEAR GOLD BOND SYNDICATE.

Syndicate allotment of $1,250,000 from Kuhn, Loeb & Co. to James H. Hyde and Associates. Kuhn, Loeb & Co. purchased these bonds from the railway at 96 and accrued interest. The total profit from this syndicate was $25,047.46, divided as follows:

	Allotment.	Profit.
James W. Alexander	$625,000	$12,523 73
James H. Hyde	625,000	12,523 73
Total		$25,047 46

On November 2, 1904, at a meeting at which were present Messrs. Wheelock, Snyder, Deming, Alexander, Hyde and Jordan, the committee recommended the purchase of $1,000,000 of these bonds at 97 and interest; but before the delivery of these bonds we were notified by Kuhn, Loeb & Co. that the price would be 96 and interest. The vote for the purchase of these bonds was unanimous.

On December 12, 1904, at a meeting attended by Messrs. Wheelock, Snyder, Deming, Alexander, Hyde, and Jordan, the committee recommended the purchase of $450,000 at 96½ flat, which were purchased from Fanshaw at 96.37 and interest. The vote was unanimous.

On January 9, 1905, at a meeting at which were present Messrs. Wheelock, Snyder, Deming, Alexander, and Jordan, the committee recommended the purchase of $550,000 at 97 and interest, which were purchased from Alexander, Thomas & Davies. The vote was unanimous.

On January 11, 1905, at a meeting at which were present Messrs. Wheelock, Snyder, Deming, Alexander, and Jordan, the committee recommended the purchase of $1,000,000 at 97 and interest, which were purchased from Alexander, Thomas & Davies. The vote was unanimous.

The society still holds $3,000,000 of these bonds. April 24, 1905, 97⅝ bid; 97¾ offered.

September 26, 1904.

P., C., C. & St. Louis Railway Consolidated Mortgage 4 Per Cent. Gold Bond Syndicate.

Syndicate allotment of $500,000 from Speyer & Co. and Kuhn, Loeb & Co. to James H. Hyde and Associates. Speyer & Co. and Kuhn, Loeb & Co. purchased these bonds from the railway at par and accrued interest. The total profit on this syndicate was $10,261.46, divided as follows:

	Allotment.	Profit.
James W. Alexander	$250,000	$5,130 73
James H. Hyde	250,000	5,130 73
Total		$10,261 46

On October 14, 1904, the society bought from Kuhn, Loeb & Co. $1,000,000 at 103. There is no record of this transaction having been brought before the executive committee, but it was duly reported to the finance committee on November 7, at which meeting were present Messrs. Wheelock, Schiff, Depew, Jordan, Snyder, Deming, Alexander, and Hyde.

The society still holds $1,000,000 of these bonds.

April 24, 1905, 105½ bid.

October 14, 1904.

Norfolk and Western Divisional First Lien and General Mortgage 4 Per Cent. Bond Syndicate.

Syndicate allotment of $250,000 from Brown Brothers & Company to James H. Hyde and Associates. Brown Brothers & Company purchased these bonds from the railway company at 94½ and interest. The total profit from this syndicate was $3,758, divided as follows:

	Allotment.	Profit.
James W. Alexander	$125,000	$1,879 00
James H. Hyde	125,000	1,879 00
Total		$3,758 00

In October 17, 1904, at a meeting at which were present Messrs. Wheelock, Depew, Snyder, Hyde, and Jordan, the committee recommended the purchase of $250,000 at 96½ and interest, less ¼ per cent. commission. The vote was unanimous.

The society still holds $1,500,000 of these bonds.

April 24, 1905, 98⅛ bid.

May 6, 1904.

IMPERIAL JAPANESE GOVERNMENT 6 PER CENT. STERLING LOAN GUARANTEED SYNDICATE.

Syndicate allotment (first syndicate) of $2,000,000 from Kuhn, Loeb & Co. and (second syndicate) of $1,200,000 from Kuhn, Loeb & Co. to James H. Hyde and Associates. Kuhn, Loeb & Co. purchased these bonds at 89 and interest. Total profit on the first syndicate was $25,635.41, divided as follows:

	Allotment.	Profit.
Equitable Life	$750,000	$9,613 26
James W. Alexander	250,000	3,204 43
James H. Hyde	250,000	3,204 43
George H. Squire	250,000	3,204 43
*W. H. McIntyre	250,000	3,204 43
H. C. Deming	125,000	1,602 22
*A. W. Krech	125,000	1,602 21
Total		$25,635 41

Total profit on the second syndicate was $23,424, divided as follows:

	Allotment.	Profit.
Equitable Life	$450,000	$8,784 00
James W. Alexander	150,000	2,928 00
James H. Hyde	150,000	2,928 00
George H. Squire	150,000	2,928 00
*W. H. McIntyre	150,000	2,928 00
H. C. Deming	75,000	1,464 00
*A. W. Krech	75,000	1,464 00
Total		$23,424 00

The executive committee, May 6, 1904, left the matter of subscribing to these bonds to Messrs. Alexander & Squire, with power. Present at the above meeting: Messrs. Wheelock, Depew, Squire, Snyder, Deming, Alexander, and Jordan.

The society purchased $1,801,900 in this syndicate, which cost them $1,688,117. These were sold at a loss of $953. Mr. Hyde was absent from the committee meeting when these purchases were authorized.

Mr. M. L. Schiff brought this syndicate to Mr. Alexander, who verbally accepted the same in name of James H. Hyde and Associates (Mr. Hyde being in Europe), and the allotments were approved by Mr. Alexander.

November 3, 1904.

IMPERIAL JAPANESE GOVERNMENT 6 PER CENT. STERLING LOAN (SECOND SERIES) SYNDICATE.

Syndicate allotment of £400,000 from Kuhn, Loeb & Co. to James H. Hyde and Associates.

The total profit from this syndicate was $62,815.13, divided as follows:

	Allotment.	Profit.
James W. Alexander	£180,000	$28,266 81
James H. Hyde	180,000	28,266 81
Mercantile Trust Company	20,000	3,140 76
Equitable Trust Company	20,000	3,140 76
Total		$62,815 13

*Not a member of executive or finance committee.

On December 5, 1904, the Equitable purchased $1,600,000 (£30,000 of which were for the Mercantile Trust Company) at a cost of $1,401,888 and sold all at a profit of $94,674.

There is no record that this purchase was submitted to the executive committee, but at the finance committee meeting on January 4, 1905, when this was approved, the following were present: Messrs. Wheelock, Schiff, Jordan, Snyder, Deming, Krech, and Hyde.

In offering these participations to James H. Hyde and Associates it was well understood by the bankers that in no case was there any understanding, express or implied, that the Equitable was to buy any of these bonds.

You will also understand from the foregoing, and from your own knowledge of similar transactions, that no purchases by the Equitable Life Assurance Society of any of the foregoing securities relieved the syndicate called James H. Hyde and Associates from its liability to the Bankers Syndicate except in the proportion that the purchases by the Equitable bore to the total liabilities of the Bankers Syndicate.

Since the preparation of the foregoing I have heard that there was one other transaction in the name of James H. Hyde and Associates which may be covered by your inquiry. This transaction was not in my charge and I have no papers concerning it, but I will endeavor to get them and will then give you the information.

There were other banking syndicates headed by such houses as Speyer & Co. and J. P. Morgan & Co., in which the syndicate known as "James H. Hyde and Associates" had an interest. I do not give the details of these operations because the Equitable Life Assurance Society never purchased any of the securities involved, and because, therefore, they are operations which do not concern your committee.

Respectfully yours,

(Signed) JAMES H. HYDE.

H. C. FRICK, Esq., *Chairman, Investigating Committee.*

On April 28, Mr. Hyde wrote concerning the transaction referred to in the latter part of his letter as follows:

In my letter of the 27th instant, I stated in the next to the last paragraph, that since the preparation of said letter of April 27, I had heard that there was one other transaction in the name of James H. Hyde and Associates which may be covered by your inquiry. This transaction was not in my charge and I had no papers at that time concerning it. I find that these papers were in the hands of Mr. Squire. The facts concerning this syndicate are as follows.

January 10, 1902.

ATCHISON, TOPEKA & SANTA FE RAILWAY 4 PER CENT. SERIAL DEBENTURE BONDS.

Syndicate allotment of $500,000 from J. P. Morgan & Co. to James H. Hyde and Associates. J. P. Morgan & Co. purchased these bonds from

the railway at 94½ and accrued interest. The total profit on this syndicate was $11,422, divided as follows:

	Allotment.	Profit.
James W. Alexander	$100,000	$2,284 40
James H. Hyde	100,000	2,284 40
George H. Squire	100,000	2,284 40
Louis Fitzgerald	100,000	2,284 40
*W. H. McIntyre	100,000	2,284 40
Total		$11,422 00

On January 13, 1902, at a meeting of the executive committee at which were present Messrs. Wheelock, Depew, Jordan, Squire, Snyder, and Alexander, the committee left with the president, with power, the matter of purchasing $1,000,000 of these bonds. The vote was unanimous.

On January 15, 1902 at a meeting attended by Messrs. Wheelock, Jordan, Squire, Alexander, and Hyde, the purchase of $1,000,000 of these bonds, debentures "D," "E," "F," and "G," at 98½ and interest to 97 and interest was reported to the committee. (Purchased January 16, 1902.)

On January 22, 1902, at a meeting attended by Messrs. Fitzgerald, Wheelock, Jordan, Squire, Snyder, Alexander and Hyde, the committee recommended the sale of $1,000,000 of these bonds, price and time to be left to the discretion of Mr. Squire.

On April 10, 1905, at a meeting attended by Messrs. Depew, Snyder, Deming, Krech, Frick, Alexander, Hyde, Tarbell, Wilson, McIntyre, and Jordan, the committee recommended the sale of $250,000 Series "D" at 100⅛ and interest.

On April 12, 1905, at a meeting attended by Messrs. Depew, Snyder, Deming, Krech, Frick, Alexander, Hyde, Tarbell, Wilson, McIntyre, and Jordan, the committee approved of the sale of $250,000 series "D" at 100⅛, and interest, which were sold on April 11, 1905.

The checks in payment of profits in this syndicate were sent out by Mr. George H. Squire, and not through my check book.

Very respectfully yours,

(Signed) JAMES H. HYDE.

H. C. FRICK, Esq., *Chairman.*

On May 2, 1905, Mr. James W. Alexander responded by letter to the committee's specific request for a statement of facts within his knowledge "showing or tending to show malfeasance or nonfeasance on the part of any director or high official of the Equitable Society," in which letter he states:

(1.) Speaking of Mr. Hyde, I proceeded in my statement to the committee of twelve to say that he has committed the society to transactions, positions, relations, and agreements without prior consultation with the president or other officers or with the committees, calling the matter to their attention only after the society had been placed in positions from which it was difficult, if not impossible, to recede.

*Not a member of executive or finance committee.

For example, I mention the purchase of some $700,000 par value of bonds of the Coney Island and Brooklyn Railroad Company; the purchase of 1,000 shares of the stock of the Hibernia Bank and Trust Company of New Orleans; the purchase of some $1,700,000 of the preferred stock of the Union Pacific Railroad. None of these transactions was submitted before hand to the executive committee.

Your committee should note, in connection with these particular transactions, first, as to the Coney Island and Brooklyn Railroad bonds, that Mr. Hyde is one of the vice-presidents of that company, and heavily interested in it; second, as to the Union Pacific preferred stock, that at the direction of Mr. Hyde, it was entered in the books and statement of the society for January 1, 1904, as a "syndicate" holding. These purchases were made without prior consideration by the executive committee, and without my knowledge. I am informed that Mr. Hyde personally was a member of the syndicate. Upon inquiry since made, I am satisfied that this stock held by the Equitable is the proportionate amount of stock subscribed for under the syndicate agreement by Mr. Hyde individually; that one of the conditions of the agreement was that the stock shall not be sold by the individual subscribers for a period of years or some provision to that effect. This particular transaction evidences two things —the improper assumption of authority to commit the Equitable to large transactions without proper consultation and supervision, and the making of the Equitable to all practical purposes a party to an agreement such as, in my opinion, it is not justified in becoming a party to by reason of the fact that the agreement is speculative and binds the society to its conditions, which may not only become onerous, but damaging to its interests, and which lies entirely outside of the pale of permissible transactions for an insurance company.

(2.) Not only does he (Mr. Hyde) thus disregard the established checks upon improvidence and indiscretion on the part of any individual officer, but he undermines the president's authority behind his back, and admonishes officers and subordinates, and notifies people dealing with the society to have their transactions with himself, stating that the president's wishes, action and judgment in any matter may be ignored.

Many instances of this could be given. Mr. McIntyre, who is regarded as the personal representative and spokesman of the vice-president, has not only carried out transactions without their submission to the president, but, on being questioned as to the president's attitude or approval of such transactions, has in repeated instances expressly stated, in answer to such inquiries, that it made no difference. In as important a transaction as the proposed merger of the Mercantile Trust Company and the Equitable Trust Company, which was under serious consideration some months ago, and which has not been abandoned, Mr. Hyde communicated to the president of one of the companies his desire that the matter be not discussed with the president of the society, but only with himself, and in numerous instances both Mr. Hyde and Mr. McIntyre have stated openly that important matters of a financial nature requiring the consideration or approval of the society should be submitted only to his office, and have dissuaded corporations and individuals with whom the Equitable sustains financial relations from having anything to do with the society's president.

This has been done behind my back, and in the most persistent manner, showing a settled purpose on the part of the vice-president to break down the authority and influence of a superior officer, and at the same time to increase his personal influence and control of the financial operations of the society, without regard to propriety or the effect upon the society of the methods adopted by him.

(3.) I further stated that "he (Mr. Hyde) has committed the society upon his own responsibility and without prior consultation with the proper officers to enterprises which should have received deliberate consideration before completion, and from interests of personal prestige or advantage, the society's requirements and benefit being a secondary consideration."

The instances specified under the foregoing statement numbered "1" are also illustrative of this specification. I might mention, further, the very extensive purchases of the stock of the New York Central Railroad Company made under the urgency and persuasion of Mr. Hyde for the purpose of creating a basis for a request on his part for election to the board of directors of the New York Central Railroad.

(4.) I made the further statement: "He (Mr. Hyde) has displayed a strong personal ambition and an inordinate and unsafe love of prominence, a quick responsiveness to flattery, a pliancy in the hands of persons whose interests are not necessarily parallel to those of the policyholders of the society. This, in conjunction with his conception of arbitrary power and right as the holder of the control of the stock, renders him a highly unsafe official."

As illustrative of the foregoing specification, I beg to instance the following companies in which Mr. Hyde has procured his election as a director:

American Surety Company, trustee.
Brooklyn City and Newtown Railroad, director.
Colorado Fuel and Iron Company, director.
Commercial Trust Company of Philadelphia, director and vice-president.
Coney Island and Brooklyn Railroad Company, second vice-president and director.
Conried Metropolitan Opera Company, vice-president and director.
Continental Insurance Company, director.
Crocker-Woolworth National Bank, trustee.
DeKalb Avenue and North Beach Railroad Company, director.
Delaware and Hudson Company, member of the board of managers.
Equitable Life Assurance Society of the United States, vice-president and director.
Equitable Trust Company of New York, vice-president and trustee.
Federation of French Alliances in the United States, director.
Fidelity Trust Company of Newark, director.
Fifth Avenue Trust Company, trustee.
First National Bank of Chicago, director.
First National Bank, Denver, director.
Franklin National Bank of Philadelphia, director.
Greenwich Savings Bank, trustee.
International Mercantile Marine Company, director.

Interurban Street Railway Company, director.
Lawyers' Mortgage Company, director.
Lawyers' Title Insurance Company of New York, director.
Long Island Railroad Company, director.
Manhattan Railway Company, director.
Mellon National Bank, Pittsburgh, director.
Mercantile Electric Company, director.
Mercantile Safe Deposit Company, vice-president and trustee.
Mercantile Trust Company, vice-president and director.
Metropolitan Securities Company, director.
Missouri Pacific Railway Company, director.
Missouri Safe Deposit Company (St. Louis, Mo.), director.
National Bank of Commerce, vice-president and director.
Oregon Railroad and Navigation Company, director.
Security Safe Deposit Company (Boston), vice-president and director
Southern Pacific Company, director.
Texas and Pacific Railway Company, director.
Underground Electric Railways Company of London (Ltd.), director.
Union Exchange Bank, director.
Union National Bank, Newark, director.
Union Pacific Railroad Company, director.
Union Savings Bank, Pittsburgh, trustee.
Wabash Railroad Company, director.
Western Maryland Railroad Company, director.
Western Union Telegraph Company, director.
Westinghouse Electric and Manufacturing Company, director.

As an aid to his election as a director of certain of these companies, he has had large amounts of stock, which are owned by the Equitable in said companies, transferred to his individual name, and he now appears in many instances as a very large stockholder of record of said companies, the Equitable being the real owner of the stock.

This practice on Mr. Hyde's part constitutes a separate and distinct abuse of his position and an assumption by him of powers and privileges rightly belonging to the Equitable Society. The stock owned by the society and thus carried in his name is subject to his control and gives him the voting power and other rights and advantages incidental to the ownership of the stock. I instance the Equitable holdings of the stock in the following companies, all standing in the name of Mr. James H. Hyde:

Long Island Railroad Company, 4,600 shares.
Interborough Railway Company, 2,400 shares.
The Delaware and Hudson Company, 10,000 shares, purchased on August 11, 1906, and placed in the name of Mr. James H. Hyde by his procurement.
Manhattan Railway Company, 12,800 shares.
New York Central and Hudson River Railroad Company, 12,000 shares.
Hibernia Bank and Trust Company of New Orleans, 1,000 shares.
Pennsylvania Railroad Company, 10,380 shares.
Chicago and Northwestern Railway Company, 2,900 shares common stock; 3,700 shares preferred stock.
Chicago, Milwaukee and St. Paul Railroad Company, 500 shares.

New York, New Haven and Hartford Railroad Company, 3,666 shares.
Bank of Montreal, 800 shares.
First National Bank of Denver, 1,100 shares.

The amounts of the stock held by the Equitable in the foregoing companies may have increased or diminished slightly since the original purchases from the record of which the foregoing facts are taken.

In some of these companies he is a member of their governing or executive committees. These positions he has procured without consultation with the president of the society save in a few instances, or with the society's executive committee, and with no consideration as to the propriety of accepting such positions and the compatibility of their varied and extensive duties with his work as an officer of the society or with his freedom of attitude as the representative of the society's interests. If there is any real need for the society to be represented upon the boards of companies whose securities the society holds, that representation should not be centered in one person, who cannot, by any possibility, give proper attention to the duties of so many positions.

As a further illustration of the statements contained in the foregoing specification, I mention the fact that he has, in return for election to the boards of various companies and as an inducement or reward for such recognitions by other companies, displayed a partial and ready willingness to extend to such companies and to individuals interested therein pecuniary and other favors from the Equitable. On this subject I must defer complete specification until reports now under way are finished and submitted to me.

(5.) I further stated:

"He (Mr. Hyde) has acquired a wide celebrity and unpleasant notoriety by reason of his recreations and enjoyments of a more or less public nature, which is exceedingly hurtful to the company, disquieting to its policyholders, and discouraging to its agents. And this notoriety cannot be said to be a misfortune that has overtaken him, because he has cultivated it, striven for it, and even used the instrumentalities that he commands in the society to achieve it."

I deem it unnecessary to make any extended enumerations under this specification. I do not wish to seem to attach an undue importance to matters which may be defended as merely matters of private conduct. Many things harmless in themselves and of little importance to one indifferently situated become of very great importance when the person under consideration occupies a conspicuous position in the management and control of a great life insurance institution. Public coaches, special trains, elaborate banquets, costly and ostentatious entertainments accompanied, as they are, by continuous notoriety of a flippant, trivial, cheap description, are not only damaging to the influence of Mr. Hyde as an officer of the society, but are directly hurtful to the society. They suggest a lack of serious attitude and feeling toward his duties as an officer of the society, a deflection of his time and energies into channels and pursuits from which the society can gain no advantage and from which, on the contrary, it may suffer. They suggest by their obvious expensiveness the possibilities of enrichment in the service of the society, which should not exist and are impossible to explain, and by virtue of the publicity attending his life,

these pursuits are matters of notoriety and prove a serious obstacle to the success of the work of the society's agents, upon which its growth and vigor depend. I say in this specification that such notoriety as I here describe cannot be said to be a misfortune that has overtaken Mr. Hyde, because he has cultivated it, striven for it, and even used the instrumentalities that he commands in the society to achieve it. Some of his personal clerks, who are carried on the society's pay rolls, are chiefly occupied in the collection and dissemination of news concerning him, and during a period prior to the entertainment given by Mr. Hyde at Sherry's, in this city, on January 31st, the larger part of the energies of the advertising force of the Equitable was wholly occupied in so-called press work in connection with this event.

(6.) I further stated:

"He (Mr. Hyde) is absent from his post at least half of every year, spending his time chiefly in Paris, where he has a permanent residence. A great portion of his time when in this country is devoted to recreations, social and otherwise. The time he devotes to business is largely occupied in personal affairs and in the attendance upon interests other than those of the Equitable Life Assurance Society."

Whatever confirmation the committee desires can be readily procured by its own investigation of the society's records or inquiries it can make of Mr. Hyde himself.

(7.) I further stated:

"His influence by reason of the widespread impression of the finality of stock ownership as a basis of authority, not only enables him, but tempts him to constantly utilize his official position and his actual influence in a way that is more regardful of his personal interests than of propriety in the abstract or the interests of the society."

Under this specification I should like to lay before the committee the complete record of the so-called syndicates solely managed by Mr. Hyde for a period of over two years. I deem it proper to ascertain the history of every such transaction, which can only be procured from private records kept by Mr. Hyde, and which, notwithstanding my repeated requests for them, have thus far been withheld from me. Every transaction should be examined minutely, the circumstances under which he came into relations with the various parties from whom the participations were received should be examined, the history of each participation, the extent of any personal reservations from syndicate participations which were handed over to the society, the profit and loss upon each particular transaction, both to the society and to individuals, and what, if any, directors of the society were in any way, directly or indirectly, interested in such operations. I am unable to lay this information before the committee without access to Mr. Hyde's records, although upon the completion of the reports by the heads of departments I may be able to supply some information under this head.

In connection with this subject, I have already written the committee setting forth certain letters passing between Mr. Hyde and myself, in which the subjects above alluded to were mentioned. The payment of the cost of the dinner given by Mr. Hyde to Cambon was one of the subjects mentioned in said correspondence, and should receive your attention. It

involved an expenditure of $12,800, which was paid by the society upon Mr. Hyde's direction, without my knowledge and without the knowledge of the executive committee. Mr. Hyde, in the letter which accompanies his restoration of this amount to the society, stated that the dinner had been given for the purpose of advertising the society. No other officer or person connected with the society was aware that it was being advertised by this dinner, and I accepted an invitation to attend the same as Mr. Hyde's guest, in entire ignorance of the fact that I was participating in the advertisement of the company of which I was president. Mr. Hyde's real purpose in giving this entertainment, and in making this very liberal use of the funds of the society, was kept secret from me until two years and a half had elapsed since the date of the dinner.

The name of the Equitable Life Assurance Society was not mentioned at the dinner, nor was anything said or done in connection therewith from which any clue could have been derived as to the advertising purpose of the dinner. I may add that it would have been a most improper and injurious method of advertising the Equitable if its name had ever been connected with it.

I desire to call the committee's attention also to the fact, only recently discovered by me, that Mr. Hyde has procured the payment to him by the Mercantile Trust Company of an annual salary of $12,500. He is the nominal vice-president of the company, gives but slight attention to it, and was elected such by reason of his official position in the Equitable and by reason further of the Equitable's large interests as a stockholder in the company. Mr. Hyde is also vice-president of the Equitable Trust Company, and I only recently discovered that he has been for some time in receipt of an annual salary of $10,000 from this company. He is also vice-president of the Commercial Trust Company of Philadelphia, from which he receives an annual salary of $2,500. I think the committee should ascertain whether there are other companies from which Mr. Hyde is in receipt of salaries. The salaries paid to him by the Equitable Trust Company and the Mercantile Trust Company are full pay for an active and experienced vice-president, giving his whole time to his duties. Mr. Hyde has no right to accept a position which necessitates the withdrawal of any of his time or attention from his duties as the vice-president of the Equitable Life Assurance Society. He procured his election to the vice-presidency of the Equitable Trust Company and the Mercantile Trust Company without consultation with me, or the executive committee, or the board of the Equitable Life Assurance Society, and chiefly by reason of the Equitable Life Assurance Society's large holdings of the stock of said companies.

Under the committee's requisition of April 8, there will be supplied to it a record showing the salaries paid by the Equitable Life Assurance Society to the various employees identified with Mr. Hyde. I am informed that there are carried upon the society's pay-roll a number of persons who render no service to the society, but whose time is completely taken up in the performance of personal services to Mr. Hyde. I shall furnish additional details as soon as possible on this subject.

I find that Mr. Hyde has drawn for sundry expenses from the society since January 1, 1900, a sum approximating $75,000. These sums are variously charged to traveling expenses, sundry expenses, and entertain-

ment expenses. But very little could be justified on the score of traveling expenses, as Mr. Hyde's duties are in no wise connected with the agency side of the society's business, and I respectfully refer the subject to the committee's examination, as the withdrawals under these headings are obviously excessive.

I also have discovered from recent examinations that Mr. Hyde has arbitrarily raised the salary of certain of the society's employees without consultation with me, or with any committee, and without any semblance of authority to do so. I instance the recent increase of Mr. McIntyre's salary from $25,000 to $30,000, upon Mr. Hyde's personal direction; the salary of Mr. Charles F. Williamson, his personal secretary, from $5,000 to $7,200; the increase of the salary of Mr. W. B. Bramwell from $6,000 to $7,500.

(8.) I further stated:

"He (Mr. Hyde) has often been remonstrated with and has at times made promises of more careful consideration of the duties of his relations to the society. But these promises are soon forgotten and his mistakes have become more and more frequent and aggravated."

I deem it unnecessary to particularize under this specification beyond its assertion.

(9.) I further stated:

"His connection with the society has become an argument used against the Equitable by its competitors and against which the society's agents confess themselves unable to make satisfactory headway."

I believe this to be one of the most important specifications which I made in my statement to the committee of twelve. A great amount of evidence can be submitted under this heading. For years the society has been in receipt of protests that have come in increasing frequency and number, from the agents as to the difficulties they experience by virtue of Mr. Hyde's relations to the society as an officer. The agents of the society have been making apologies, explanations and denials for years. They are men of independent position, thoroughly versed in life insurance and attached to the Equitable and to its traditions, at one time exceedingly friendly, even partial, to Mr. Hyde. The society is a public institution, dependent upon public confidence for its success and growth. The work of the agents is to persuade the public, against the competing claims and pretensions of every other life insurance company, that the Equitable contract is the safest and best.

I transmit the foregoing material to you without much thought of arrangement or method of presentation. Other matters which I do not now allude to will be brought to your notice in authentic form through the reports from the departments called for under your requisition of April 8th. From time to time as such reports are submitted to me I will see that any comment or explanation needed to clarify them is made, and I shall also supplement this communication as soon as I can procure the necessary data, with a more formal and complete reply to the request, contained in your letter of April 8th. The matters herein stated, however, are numerous and in my judgment important.

Respectfully yours,

JAMES W. ALEXANDER.

The committee, upon the receipt of these communications from Mr. Hyde, notified all of the persons named by Mr. Hyde as members of the syndicates whose operations he detailed, and invited their respective statements relative thereto. So far as responses were received they are filed herewith.

The committee also made the following requests for information from Mr. James W. Alexander:

The committee has instructed me to inquire of you especially in regard to the allegation that Mr. James H. Hyde, first vice-president of the society, had from time to time purchased, without proper authorization, securities for the society; when this practice upon his part first came to your knowledge; and what steps, if any, you took to bring this alleged practice of Mr. Hyde to the attention of the executive committee, the finance committee, or the board of directors of the society.

The committee also especially desires to know when you were first informed of the fact that securities belonging to the society were held in the name of James H. Hyde and were utilized by him for the purpose mentioned in your letter, and what steps, if any, you took to bring this matter to the attention of the executive committee, the finance committee, or the board of directors.

This inquiry is intended to extend to each case specified by you in your letter of May 2, 1905.

The committee would likewise have you explain the process by which the society's funds were drawn from its treasury to pay for securities whose purchase had not been previously authorized, and also whether the securities of the society standing in the name of Mr. Hyde, to which you refer, were originally issued in his name or transferred to him subsequent to their purchase, and if transferred, by whom.

The committee will thank you to inform it how, under the charter and by-laws of the society, investments are authorized for the society, and what officers are the proper officers to conduct the negotiations and see that the society receives the thing which it purchases. Also, whether in the practice of the society the legal rule governing such matters has been deviated from by others than Mr. Hyde, and if so, by whom. In a recent communication received from Mr. Hyde he states that you were a member of various syndicates whose operations were conducted under the name of "James H. Hyde and Associates," and that you participated in the distribution of the profits of those syndicates to the extent named in Mr. Hyde's communication, a copy of which, in so far as it bears upon this subject, I herewith enclose you.

Very respectfully,

H. C. FRICK, *Chairman.*

To this communication the committee received a reply from Mr. Alexander, dated the 13th of May, 1905, a copy of which is filed herewith. In this reply Mr. Alexander does not claim to have brought the irregularities of Mr. Hyde to the attention of either the finance committee, the executive committee, or the board of directors, at any time previous to the 8th of February, 1905, and then only in connection with his argument to the special committee of twelve in respect to the mutualization of the society,

wherein, as he says, he referred "in general terms to the transactions above described, further details as to which were given in my letter to you of the 2d instant," meaning the 2d of May, 1905. Mr. Alexander's explanation of this failure to bring these alleged irregularities of Mr. Hyde to the attention of the proper authorities in the society is that he was not aware of them until January, 1905. In view of the grave duties and responsibilities and large powers cast upon the president of the society by its by-laws, to which the committee has referred at length in a previous portion of this report, this explanation, in the committee's opinion, convicts Mr. Alexander of gross neglect of his duties to the society. Transactions of such magnitude, and so numerous, and extending over such a long period of time, and affecting so many of the society's holdings of securities in so many corporations, could not have escaped the knowledge of a president who was giving to the affairs of the society such attention as is contemplated by his acceptance of the office with the powers which it carries with it.

We will first consider the "James H. Hyde and Associates" syndicate.

The syndicate known as "James H. Hyde and Associates" was not a permanent association, but changed its personnel frequently.

As shown in his letter, Hyde and Associates conducted a considerable number of transactions. In nine of them the Equitable Society became the purchaser of some or all of the securities involved.

In these nine transactions, securities to the par value of $9,300,000 were handled. The total profit to the syndicate in the nine operations was $204,504.39.

In two of these nine transactions, the Equitable Society was a party in the syndicate, participating in the profits. The total profits of these two transactions were $49,059.41, of which the society received $18,397.26, which amount was exactly three times the amount received by the next largest participant.

Of the total profits of $204,504.39, $167,741.50 was received by eight individuals who were directors in the society and six of them members of the executive and finance committees.

In the case of one purchase of syndicate securities the society was guaranteed to be given the benefit of any decline in prices during the life of the syndicate. In furtherance of this guarantee, the society received a rebate of $30,000, and subsequently sold the securities at a profit of $71,882. The syndicate's profit on the transaction was $11,930.55.

In one case in which the syndicate profit was $30,210.38, the society now holds the securities purchased, which at present quotations show a loss of about $60,000.

In all other cases the society has either made a profit, or could make a profit by selling the securities at the present market.

The net result to the society of the purchase of these syndicate securities has been a very considerable profit. If the society had acquired the securities by taking allotments in the original underwritings to which the Hyde syndicate was a party, it would have made larger profits. The profits would have been greater by $186,107.13.

Or if the society's directors who figured in the syndicate had acted solely for the society, the society's profit would have been $167,741.50 greater than it was.

It is elementary that a corporation is a trustee for its stockholders, the funds and other property held in the name of the corporation constituting the trust estate; and where the business conducted is that of insurance the corporation is also a trustee for the policyholders. At least this is so in the case of mutual insurance or insurance "conducted on the mutual plan." But a corporation must act through natural persons, and, therefore, those who exercise the corporate powers—the officers and directors—necessarily assume the character of trustees. Now Messrs. Alexander and Hyde are the chief executive officers as well as directors of the Equitable Society. They are also members of its executive and finance committees, which have charge of the investment of the society's funds. With respect to the funds and other property of the society they are, therefore, in the highest sense fiduciaries and are governed by the principles of the law of trusts, which are not less strict—in some instances stricter—than the moral code itself. One of the most fundamental of these principles is that a trustee shall not profit at the expense of the trust estate. Another, closely connected with that just mentioned, is that a trustee shall not enter into any relation with the trust estate in which his interests and those of the estate may conflict, as, for example, the relation of buyer and seller.

In his letter to the committee dated April 27, 1905, Mr. Hyde admits that he, together with Mr. James W. Alexander and the other officers named by him, was a member of a syndicate, known as "James H. Hyde and Associates," which, in seven different instances, was a member of underwriting syndicates which sold the securities underwritten to the Equitable Society at an advance in prices which yielded Mr. Hyde and his associates, as participants in the underwriting syndicate, in the aggregate, a profit of $155,444.98. These sales were made almost immediately after the allotment to the Hyde syndicate of its share of the underwritten securities; in one case only three days intervened.

In this course of dealing with a corporation which they were serving in positions of the highest trust and delicacy, these officials were guilty of a breach of propriety and a serious breach of trust, which, so far as the principle of the thing is concerned, is not mitigated by the fact that the society has lost nothing by the transactions, but is the gainer by reason of the subsequent increase in the market value of the securities which it purchased.

The committee has been advised by Mr. Hyde that he has deposited with the cashier of the society his check for $61,440.92, the amount of his share of the profits on the aforementioned transactions, with the request that the board decide whether those profits rightfully belong to himself or to the society. The committee recommends that the board inform Mr. Hyde that, in its opinion, those profits were obtained in violation of the rights of the society and that therefore he is indebted to the society in an amount equal to the profits in question, and that his check for that amount will be placed to the credit of the society.

The committee finds as a fact that the syndicate operations were conducted as described in Mr. Hyde's letter of April 27 for the benefit of the persons, and in the proportions therein named, and that said persons received the respective amounts detailed by Mr. Hyde, and that such of

them who were directors and members of the executive committee at the time the purchases of said securities were authorized, are likewise indebted to the society in such amounts with interest.

Since reaching the conclusions stated above the committee has received from Mr. James H. Hyde a letter of May 11, 1905 (attached to this report), in which he argues, from his view of the facts and the law as he is advised, that he and his associates in the syndicate known as "James H. Hyde and Associates," were safely within the law and proprieties in conducting the syndicate operations above referred to, which communication the committee has carefully examined and fully considered and finds nothing therein to warrant it in changing the opinion expressed above.

In order to justly condemn such transactions it is not necessary that it should be shown that the securities so purchased were undesirable investments; or that the transactions were unfair to the society, nor that the directors who made the purchases were actuated by unworthy motives, as experience proves that real motives often elude the most searching investigation. Unqualified fidelity of an officer to his trust is required; and to secure this the law will not permit him to occupy a situation in which he *may be* tempted by his private interest to sacrifice his principle.

Of the nine members of the executive committee which purchased securities for the society, six (including the president and vice-president in every case) were members of the "Hyde and Associates" syndicate in one or more of the transactions detailed where the society purchased securities at an advance from the banking houses which allotted a share of the underwriting and a share of the profit to the Hyde syndicate.

Mr. Hyde, in defence of the practice, says:

"It is the custom of the banking house to divide up the risk by securing a large number of underwriters of the risk, each underwriter in effect guaranteeing the sale to a limited extent, and, in compensation for the risk which he assumes, receiving a proportion of the profits which will come to the banking house in case the sale is successful."

The connection between this guarantee of the sale, which implies finding a customer, the assumption of the risk of finding a customer, the profits received as compensation for that risk, and the fact that the society was the customer is too obvious for further comment.

The Alexander Charges Against Hyde.

These charges constitute a serious arraignment of Mr. Hyde. They involve his personal and official integrity and they allege a condition of affairs in the management of the society that is in utter defiance of all the safeguards provided by its charter, its by-laws, the general rules of law, and sound business practices. So open, flagrant, obvious, persistent, and dangerous are the practices of which Mr. Hyde is accused, that the establishment of their truth convicts of equal guilt all who were cognizant of their existence and failed promptly to set about their correction.

If Mr. Hyde involved the society in transactions of magnitude without legal authority, if he prevented the president or other officers of the society from participating in the consideration and disposition of matters in respect to which they owed a duty to the society under its charter and by-laws, if he attempted to break down the authority of his superior

officers, if he committed the society upon his own responsibility to important transactions such as the purchase of securities, if he secured his election as a director to represent the interests of the society in other corporations against the wish of the proper authorities in the society, if, without the authority of the society, he has taken in his own name large amounts of its securities, if, without the society's consent, he has assumed any relations to other organizations that are incompatible with his position as an officer of the society, or the attention to which withdraws his services from the society, if he has used the society's funds improperly for the payment of his own personal expenses or to gratify his own personal tastes or vanity, and if he has combined with others to make secret profits out of transactions with the society through syndicates or otherwise, or, in short, if he is guilty of one-half of what is charged against him in Mr. Alexander's letter of May 2, 1905, he has shown his entire disqualification for the important and responsible office which he occupies.

Upon the other hand, it is equally true that anyone holding a position of trust in the society who had knowledge of any one or all of these practices is culpable in neglecting or failing promptly to disclose his knowledge thereof to the board of directors.

It is important to inquire, when, how, for what purpose, and by whom the accusations against Mr. Hyde were first brought to the attention of the board of directors.

As it is pointed out in the beginning of this report, the first accusation made against Mr. Hyde is contained in the supplemental petition to the board of directors requesting the mutualization of the company, dated February 7, 1905, and signed by James W. Alexander, president; Gage E. Tarbell, second vice-president; George T. Wilson, third vice-president; William Alexander, secretary, and thirty-five other officers of the society. This accusation was in the following language: "We also deem it proper to add that in our opinion, after the most careful and anxious consideration of the subject, the reelection of Mr. Hyde as vice-president and acting president in the absence of the president, with all the powers he has exercised, would be most prejudicial to the welfare and progress of the society and the conservation of the trust funds held for the benefit of our policyholders. Mr. Hyde's prominence in various ways and his acts as vice-president are such as tend to provoke criticism of the society, to create misgivings as to the conservatism of its management, and to injure its business as an institution which has been uniformly held out to the public as conducted solely on the mutual plan for the benefit and protection of its policyholders."

Although dated February 7, 1905, the day before the annual meeting for the election of directors and officers of the society, this supplemental petition was not presented to the board of directors until February 8, at the annual meeting. It will be observed that this accusation against Mr. Hyde is couched in the most general language, and the board is urged not to reelect Mr. Hyde as vice-president solely for the reason that his reelection "with all the powers he has exercised (not abused) would be most prejudicial to the welfare and progress of the society," and because "Mr. Hyde's prominence in various ways and his acts as vice-president are such as tend to provoke criticism of the society and to create mis-

givings as to the conservatism (not honesty or regularity) of its management." There is not even an intimation in the objection to Mr. Hyde's reelection presented upon the day of the election of any of the serious matters that are set forth in Mr. Alexander's letter of May 2, 1905. The election of directors and officers did not take place on the 8th of February, but was deferred until the 16th of February, at which time the board had before it Mr. Alexander's communication of February 15th, wherein, after setting forth his arguments in favor of the mutualization of the society, he makes more extended charges against Mr. Hyde for the purpose of advancing his argument for mutualization, and we suppose likewise for the purpose of defeating Mr. Hyde for reelection as vice-president. A perusal of this communication of Mr. Alexander will likewise disclose that it is couched in the most general terms and does not charge Mr. Hyde with any specific wrong-doing, although Mr. Alexander had at that time the knowledge upon which he based his belief that Mr. Hyde had been guilty of the specific acts with which he charged him in his letter of May 2. That Mr. Alexander made these charges against Mr. Hyde for the purpose of advancing his proposed scheme of mutualization seems clear from these two facts: first, that at the meeting on February 16, a scheme of mutualization was agreed upon; and second, that at this meeting of February 16, Mr. Hyde was reelected first vice-president, Mr. Alexander voting for him.

Now, what are the facts concerning Mr. Alexander's knowledge of the gravest of his charges against Mr. Hyde, which he certainly should have fully disclosed to the directors in order to prevent Mr. Hyde's reelection? Referring to a letter written by Mr. Alexander on April 17, 1905, to the chairman of this committee, which is a reply to a published letter of Mr. Hyde addressed to the chairman of this committee under date of April 15, 1905, in which Mr. Hyde set out his connection with the syndicate of James H. Hyde and Associates, and accused Mr. Alexander of being a member of said syndicate also, Mr. Alexander states, after denying "that he knowingly participated in the profits of any syndicate formed for the purpose of underwriting bonds or securities of which the society was to become a purchaser," that "early in January (1905) Mr. Hyde delivered to me two checks aggregating $40,000 which he stated were profits from my allotted participations in certain syndicates which I found upon a prompt investigation had underwritten securities to be sold concurrently to the society." Mr. Alexander then adds: "This was before any controversy had arisen in the society," and that he turned the amount of this check over to the society's cashier "solely on my own judgment as to the propriety of the transaction." From this letter there can be no question about either of these propositions: First, that early in January, 1905, and before any controversy had arisen in the society, Mr. Alexander knew or believed that he knew, as a result of his own investigation, that Mr. Hyde was in a syndicate to underwrite securities to be sold concurrently to the society. Second, that the profits upon such securities so sold to the society were very large, as Mr. Alexander's allotted share amounted to $40,000. Third, that Mr. Alexander's conscience and judgment disapproved the transaction. That is to say, Mr. Alexander knew, or thought he knew, long before the annual election, of the grossest sort of breach

of duty upon the part of Mr. Hyde, and though protesting against the reelection of Mr. Hyde for reasons of his own, bearing upon the proposed change in the constitution of the society, he failed to disclose to the board of directors this breach of duty, which would have been a sufficient reason for not reelecting Mr. Hyde.

The committee deem it unnecessary to enter into the same detail in respect to the other irregularities charged against Mr. Hyde by Mr. Alexander. Mr. Alexander's duty of disclosure was the same in each case. The charges all have reference to matters occurring before the annual election of which Mr. Alexander had, or should have had, knowledge.

Upon Mr. Alexander's own statement of the misdoings of Mr. Hyde the committee finds that Mr. Alexander was culpably negligent in acquiescing in them for so long a period and in not bringing them to the attention of the board of directors at such time and in such a way as to enable the directors to consider them in connection with the exercise of their responsible duty of electing the officers of the society.

Not only has Mr. Alexander concealed from the directors the irregularities of Mr. Hyde, of which he was cognizant and of which he now complains, but Mr. Alexander openly encouraged them. In so important a matter as aiding in the proper conduct of the examination that the by-laws of the society provided the fiscal or examining committee should make of "the accounts and assets of the society at the close of each fiscal year," Mr. Alexander openly advised Mr. Hyde while he was entirely under his tutelage that this might, and should, be ignored.

November 14, 1904, Mr. Alexander wrote to Mr. Hyde.

"I don't know just when Willie is to return, but I suggest with your concurrence, that he be charged with the responsibility of steering the fiscal committee when it meets. We have two new members on it and it is just as well that they should all be under reasonable observation. Let him remember that the only duty of this fiscal committee is to prove our annual statement.

"It is not their province to go into the management of the company, or to express opinions about methods. When they come to proving what we call our 'Leger Balances,' it has been the usage that the chairman of the committee (Mr. Wheelock?) should make the comparisons and the committee adopt his report. I shall cross this off my memorandum and you can, if you like, lay it aside for Willie on his arrival, unless you have some other views."

From letters of Mr. Alexander to Mr. Hyde which the committee has examined, the committee finds that he flattered and encouraged Mr. Hyde in methods wholly vicious and tending to autocracy in the administration of the society's affairs.

The committee also finds that so far as Mr. Alexander's charge against Mr. Hyde is true, namely, "that he has displayed a strong personal ambition and an indrdinate and unsafe love of prominence, a great responsiveness to flattery, a pliancy in the hands of persons whose interests are not necessarily parallel to those of the policyholders of the society," that Mr. Alexander is largely responsible.

The committee finds that many of the charges of Mr. Alexander against Mr. Hyde are true, or measurably true.

The evidence submitted satisfies the committee.

(1). That Mr. Hyde has habitually involved the society in transactions, especially of purchase of securities, which were of great magnitude without the previously obtained authority of the executive committee.

(2). That he carries large amounts of stocks belonging to the society in his own name without there appearing any minute of any act of directors or committee authorizing it.

(3). That he has used the funds of the society to pay for certainly one social entertainment given in his name and the name of one other director of the society.

(4). That he has shared in the profits made by banking syndicates in effecting sales of securities to the society at a time when he was a member of the committee which made the purchase, he frequently voting for the same.

(5). That he has been guilty of other acts which were irregular and not in compliance with the society's law or with sound business practices.

The committee has fully considered Mr. Hyde's explanations of these charges. In the main he seeks to exonerate himself by pleading the custom of the society, the participation of others, the return of money improperly acquired or used, and the beneficial results to the society. As it is the function of this committee to determine what is wrong in the society's management, Mr. Hyde's arguments cannot avail. The practices he has pursued are wrong. The fact that others have pursued them or acquiesced in them only convicts them of equal guilt.

The Directors.

At no time since the early days of the society has there been a sufficient number of persons who were qualified, in respect to the absolute ownership of the number of shares each, to make up a board of fifty-two persons. It appears that almost from the beginning shares were transferred to a large number of gentlemen for the purpose of qualifying them to act as directors, in order that the board should consist of fifty-two persons as required by the charter.

It also appears that of the present board forty persons have had shares transferred to them for the purpose of enabling them to act as directors, the real ownership of the shares remaining in the trustees of the estate of Henry B. Hyde, deceased, or others. Of these forty persons, twenty-two were thus qualified during the lifetime of Henry B. Hyde. Some of them have served under such qualification for more than thirty-three years. Of the remaining number eighteen were nominated by the trustees of the stock of the late Henry B. Hyde and qualified by the latter, transferring to each of the former not less than five shares of stock, the real ownership of which remains in said trustees.

Whether or not this method of qualifying directors satisfies the requirements of the law the committee does not undertake to decide. There seems to be authority indicating that it does. There seems to be authority indicating that it does not. However this may be, there can be no doubt that the directors of the society, qualified as indicated, are in fact its directors, and as such are as much responsible for the proper administration

of its affairs as though there were no question as to the title of their shares.

An inspection of the society's books discloses at this time there are not more than twenty-five male persons qualified to be directors by reason of the absolute ownership of five shares of stock.

It is the opinion of the committee that such change should be made in the charter of the society as will enable it to secure a board of directors as to whose title to their office no question can be made.

Functions Exercised by the Board of Directors as Disclosed by their Minutes.

The minutes of the board of directors have been read through commencing with the minutes of the meeting held October 27, 1897, and coming down to those of the meeting immediately preceding the annual meeting held in February, 1905.

The proceedings of these meetings are purely formal. They consist of the election of officers and committees; the declaring of dividends on capital stock; the reading of eulogies on deceased directors and the election of other men to fill the vacancies so caused.

The directors have also, at various times, made amendments to the by-laws, all of which amendments are incorporated in the printed copy of the by-laws now in use. At each annual meeting the directors ratify and approve the acts of all committees and officers. At each quarterly, as well as annual, meeting the president submits a report which is declared adopted.

The minutes taken together indicate very clearly that exercise of power by the board is purely formal; and that the real management of the society had been delegated by the board to the various committees.

The reports of the president which are submitted to the board consists entirely of financial statements showing the society's assets and liabilities, amount of insurance written, etc. These reports contain no comment of any kind, and are spread on the minutes as presented.

By a somewhat peculiar provision of the society's by-laws, the executive committee is a subordinate body to the finance committee, the acts of the former coming before the latter for its final judgment.

The only conceivable reason for the existence of these two committees is that the society might have the benefit of the judgments of two separate bodies, and that each might serve as a check upon the other.

In creating these two committees, the board has, however, composed them of exactly the same individuals—the only exception being that the Finance Committee has one member who is not a member of the executive committee.

Because of this act of the board the effective check each upon the other, of the two committees, is wholly lost. A number of the gentlemen meet and do certain acts as the executive committee. They adjourn and immediately reconvene as the finance committee, and approve the acts of themselves while in session as the executive committee.

In each committee the principal officers of the society are members. Naturally they are the most active members of the committee. Other

members of the committees are officers of the "allied concerns." Those who might be called the "lay" members are, with the one exception, noted above, the same on both committees.

The final result of all this is that the supreme authority of the board has been, in effect, turned over wholly to the executive officers of the society. At best, the advantage expected from the watchfulness of two distinct bodies is entirely lost.

For permitting this condition, the board is responsible; and these committees should be reorganized.

The committee has read all the minutes of the executive committee from May, 1903, to date. Nine-tenths of these minutes consist simply of the statement of those who are present, together with the following:

"The minutes of the last previous meeting were read and confirmed, and all transactions completed since that date were reported and approved."

The only acts of the executive committee, aside from the formal statement above made, consist of periodical resolutions covering dividends to policyholders. There are perhaps half a dozen resolutions authorizing the appointment of general agents, or the purchase or sale of important pieces of real estate.

There are no resolutions whatever bearing on the salaries of officers or others. The closest approach of this being a resolution advising the directors to grant pensions to two retiring medical directors.

In addition to the formal minutes of the committee, there is a large amount of what are called "memoranda minutes." These are typewritten sheets containing a list of securities bought and sold, and it is assumed that in each case the executive committee approved of such transaction.

The executive committee appoints a sub-committee of two to adjust salaries. There are no minutes covering the report of such sub-committee, but it is verbally stated that the sub-committee gave direct instructions to the comptroller as to the rates of salaries to be paid. The sub-committee fixed salaries of higher executive officers only—those of subordinates being arranged by their chiefs.

The last sub-committee on salaries of which there is a record on the minutes (December, 1902) was composed of two persons, one of whom receives a salary from the society, and the other a salary from an institution in which the society is largely interested.

There are, in 1905, thirteen (13) executive officers in the society who held the same position in 1900.

In 1900 these thirteen officers received salaries aggregating $297,600. In 1905 the same officers received salaries aggregating $448,500, an increase of $150,900, or 51 per cent.

Of the thirteen officers, three have received no increase in salary since 1900. Deducting these, the average rate of increase to the other ten has been 61 per cent. The salaries of six of the thirteen show an average increase of 86 per cent.

The salary of the vice-president, which was $30,000 in 1900 and 1901, was advanced to $75,000 in 1902, and to $100,000 in 1903. The rapidity of these increases is not only unusual, but there can be no warrant for them through any question of ability to retain the officer's services at lower rates of compensation.

At the time the vice-president received a salary of $30,000 he was twenty-four years of age. When his salary was increased to $75,000 he was twenty-six, and when it was again increased to $100,000 he was twenty-seven years old. These facts indicate that the experience of the officer in question could hardly have been considered a factor in the estimation of the value of his services.

It is found that the vice-president of the society, in addition to holding the presumably purely honorary position of director in over forty corporations, is vice-president of three companies from which he receives salaries aggregating $27,000.

The salaries received by the vice-president from sources other than the society itself are as follows:

From the Equitable Trust Co., New York	$12,000 00
From the Mercantile Trust Co., New York	12,500 00
From the Commercial Trust Co., Philadelphia	2,500 00
Total	$27,000 00

The society owns 44 per cent. of the capital stock of the Equitable Trust Company, 64 per cent. of the stock of the Mercantile Trust Company, and 35 per cent. of the stock of the Commercial Trust Company. In this way the society indirectly contributes to the vice-president $14,155 a year, in addition to his direct salary of $100,000.

The way in which the directors, through their executive committee, and that committee, through its sub-committee, have increased the salaries of the principal officers of the society quite naturally does not, in its effect, end there. An examination of the office payrolls shows that the treatment received by each officer from the board is generally reflected in the treatment accorded by him to his subordinates

In those departments of which the heads have received no increase in salaries, the salaries of the working force have remained constant, or have shown such slight increases as appear to have been no more than consistent with the general tendency of salaries in all industries.

On the other hand, those officers who have themselves been rapidly advanced have quite generally seen that their subordinates shared in their prosperity—at the society's expense.

In the vice-president's office, four employees who received in the aggregate $5,444 in 1900, receive $13,900 in 1905, an increase of 155 per cent.

In the second vice-president's office, six employees who received $10,720 in 1900, receive $24,840 in 1905, an increase of 132 per cent.

The total salaries paid to employees of the president's office has increased 48 per cent. since 1900; of the vice-president's office, 134 per cent., and of the second vice-president's office, 126 per cent.

The total office payroll of the society increased from $770,282 in 1900 to $1,177,501 in 1904, or 53 per cent. As compared with this, the total income of the society increased but 36 per cent. from 1900 to 1904.

It would be futile to extend these comparisons so as to cover individual cases. There are many instances of employees who, while now occupying the same position as in 1900, are receiving salaries ranging from 100 per

cent. to 200 per cent. (and in some cases more) higher than in 1900. Taken specifically and collectively, the impression is unavoidably created that in the general adjustment of salaries, the welfare of the individual employee has been made paramount.

These statements are illustrated by the following tables:

SALARIES OF EXECUTIVE OFFICERS.

Name and Title.	1900.	1901.	1902.	1903.	1904.	1905.
J. W. Alexander, president	$75,000	$75,000	$75,000	$100,000	$100,000	$100,000
James H. Hyde, vice-president	30,000	30,000	75,000	100,000	100,000	100,000
G. E. Tarbell, 2d vice-president	50,000	60,000	60,000	60,000	60,000	60,000
G. T. Wilson, 3d vice-president	25,000	25,000	30,000	30,000	30,000	30,000
W. H. McIntyre, 4th vice-president	10,000	12,000	20,000	25,000	25,000	30,000
W. Alexander, secretary	25,000	25,000	25,000	25,000	25,000	25,000
J. G. Van Cise, actuary	17,500	17,500	17,500	17,500	17,500	17,500
T. D. Jordan, comptroller	25,000	30,000	30,000	30,000	30,000	35,000
F. W. Jackson, auditor	10,000	10,000	10,000	10,000	12,500	12,500
M. Murray, cashier	10,000	10,000	10,000	12,000	12,000	15,000
R. G. Hann, associate actuary	7,500	7,500	7,500	7,500	7,500	7,500
A. W. Maine, associate auditor	10,000	10,000	10,000	12,000	12,000	12,000
Samuel Frost, recorder	2,600	2,800	4,000	4,000	4,000	4,000
Total	$297,600	$314,800	$374,000	$433,000	$435,500	$448,500

ILLUSTRATION OF SALARY INCREASES IN INDIVIDUAL CASES.

Name and Employment.	1900.	1901.	1902.	1903.	1904.	1905.	Per cent. of increase since 1900.
L. V. Coffat, vice-pres. office	$1,560	$1,820	$3,000	$3,600	$4,600	$4,600	194.8
C. F. Williamson, v.-p. office	3,000	3,000	5,000	5,000	7,200	7,200	140.
Anna L. Amendt, 2d v.-p. office	4,200	7,200	7,200	10,000	10,000	12,000	185.7
H. L. Gorham, 2d v.-p. office	1,200	1,500	1,800	2,000	2,500	3,000	150.
W. E. Johnson, 2d v.-p. office	3,000	3,600	3,600	3,600	5,000	6,000	100.
Henry Greaves, finance dept.	720	840	1,200	1,500	2,100	2,500	247.2
John Gilchrist, security dept.	2,000	2,250	3,000	3,500	6,000	6,000	200.
D. N. Junk, cashier dept	2,500	2,750	3,000	3,250	3,600	4,500	80.
W. N. Ince, collection dept	1,300	1,500	2,500	2,500	2,750	2,750	111.5
G. F. Brophy, renewal dept	6,000	7,500	7,500	7,500	9,600	9,600	60.
J. F. McGuinness, purc. dept.	2,400	2,600	2,850	3,250	3,600	5,000	108.3
F. F. Edwards, adver. dept	3,000	3,600	5,000	6,000	6,000	6,000	100.
Total	$30,880	$38,160	$45,650	$51,700	$62,950	$69,150	123.9

ADVANCES TO AGENTS.

The society's agents are employed under contracts which provide that they are to receive as commissions certain percentages of the first premiums on policies placed by them, and certain other percentages of renewal premiums for a stipulated number of years.

Under the tenth by-law of the society, the supervision of the agencies is vested in the second and third vice-presidents, under the direction and instructions of the president. As a fact, the society's dealings with its domestic agents have been mainly through the second vice-president.

The typical agent's contract allows him 50 per cent. of the first year's premiums, 20 per cent. of the second, 7½ per cent. of the third, 15 per cent. of the fourth, and 7½ per cent. of subsequent premiums up to and including the tenth. No commissions are earned nor are payable until the premiums have been actually received by the society.

Circumstances frequently arise which make it desirable from the agent's standpoint that he be permitted to anticipate or draw against his future or unearned commissions. All life insurance companies have to a greater or less extent been in the habit of advancing money to their agents, taking as security for the sums advanced an assignment from the agent of his future commissions.

As the agent's renewal commissions are a contractural stipulation on the part of the society, loans to him which are secured by an assignment of those commissions are apparently safe, if the extent of the loan is always less than the total of the agent's future commissions.

In calculating the amount of future commissions, the uncertain factor is the unknown percentage of existing policies which may be allowed to lapse in future; for, after a policy has lapsed, no more commissions can accrue upon it. From past experience the probable percentage of lapses in individual agencies can be predicated with reasonable accuracy; but no such estimates can guard against such disturbing influences as a change in the character of persons insured, though changes in the personnel of the soliciting agents, or against an increase in the proportion of lapses resulting from great financial depression, or against an increased ratio of lapses resulting from a sudden popular distrust of the society or its methods of conducting business.

While the practice of making advances to agents has been almost universal, such advances have never been recognized as assets by the insurance departments, and there has been a very general inclination on the part of most companies to cease the practice and to close out these accounts as rapidly as possible.

On December 31, 1904, the Mutual Benefit Life Insurance Company had outstanding in advances to agents the sum of $70,419.77; the Northwestern Mutual had outstanding $17,091.02, and the Connecticut Mutual carried but $658.34 in this account. The Northwestern in its report says: "It has been the policy of the company for some years to make no advances or commute commissions for agency purposes."

Up to November, 1894, the Equitable Society had made advances to its agents to the extent, then outstanding, of $2,809,000. The insurance commissioners of New York, Massachusetts, and other States, refused to admit these loans as assets, and in order that so large a sum might not be excluded from the society's statements, the larger portion of the loan was sold, on the date named, to banks or trust companies; the security, consisting of the agent's assignment of future commissions, being reassigned to the trust companies for their protection.

By this arrangement, the agent does not borrow direct from the trust company, but borrows from the society. Every six months the society transfers or sells a portion of the advance accounts to the trust companies, pledging to the trust companies that the agent's renewal commissions amount to a stated sum per year; that he has assigned his renewals to the society, and that the society transfers the assignment to the trust company.

While realizing the uncertain factor in an estimate of the total value of an agent's renewal interests, it has been generally accepted that five times the amount of an agent's annual renewal interest was a safe sum to loan against the pledge of all his future interests.

As previously stated, in November, 1894, the society carried $2,809,000 on the books as loans to its agents. By the transfer of the bulk of this account to the trust companies, it has appeared as a much smaller amount on the society's subsequent statements.

The amount of these loans, for the past six years, as at December 31, has been as follows

	Shown on society's report.	Carried by trust companies.	Total.
December 31, 1899.....	$643,128 99	$3,508,798 39	$4,151,927 38
December 31, 1900.....	524,183 14	3,563,170 74	4,087,353 88
December 31, 1901.....	566,411 50	3,552,922 68	4,119,334 18
December 31, 1902.....	978,252 97	3,791,485 01	4,769,737 98
December 31, 1903.....	1,521,245 95	4,699,706 09	6,220,952 04
December 31, 1904.....	1,514,639 90	5,813,184 87	7,327,824 77

In the majority of cases, the amount of one agent's loan which is carried by a trust company is exactly five times the appraised value of his annual renewal. The amounts carried on the society's books are in most cases sums in excess of the five fold limit accepted by the trust companies.

A few specific illustrations are given below:

The combined accounts of J. Bohm and J. Bohm & Brother, New York, show annual renewal interests of $39,400. The advances made them are $197,000 carried on trust company's books and $235,272 on society's books. Total, $432,272, or equal to eleven (11) annual renewals.

A. C. Haynes, New York: This account is in process of adjustment, there being an "old" and a "new" account. Taking the two together, the total advances amount to approximately $870,000, or about six times the stated annual renewal interest. The "new" account showed a balance of $29,100 on January 1, 1905, and $158,447 on March 31, 1905.

R. J. Mix, New York: Annual renewals stated to be $20,000. Advances carried on trust company's books, $100,000. Carried on society's books, $197,145. Total, $297,145, or the equivalent of fifteen annual renewals. Mr. Mix receives an annual salary from the society of $12,000 as Supervisor of Agencies.

H. J. Powell, Louisville, Ky.: Annual renewals, $35,100. He had advances as follows:

Carried by Trust Company.....	$175,500 00
Carried by Society.....	234,976 00
Total	$410,476 00

or the equivalent of about twelve annual renewals. The item of $234,976 as at March 31, 1905, has increased from $139,857 as at January 1, 1905. As additional security for this amount, Mr. Powell has assigned to the society policies on his life amounting to about $175,000. These policies are in the Equitable Society; have been in existence for less than three years, and hence have no material existing value. In case of a failure on the part of Mr. Powell to keep these policies in force, the society would, by paying itself the annual premium on them, be able at some future time to pay itself the face of the policies.

In considering this matter of loans to agents, there are several points in mind, *i. e.:*

(1.) They are not recognized assets. In selling agents' obligations to trust companies, the society does not lessen its risk of loss except to the extent that others than the society are stockholders in the trust companies, but is merely enabled to show several millions as assets which would not be admitted if the accounts were carried directly by the society.

(2.) Any exhibition of the *total* of advances as compared to the *total* of renewal interests is of no value, as the account which has a large factor of safety cannot be used to strengthen the account which is overdrawn.

(3.) In case of a forced or unfavorable settlement with an agent, the trust company is the preferred creditor to the full extent of the claim.

(4.) Each agent's contract (or at least by the form used since 1899), contains a clause to the effect that in event of his leaving the society and entering the employ of another insurance company and endeavoring to carry the society's business to the other company, he absolutely forfeits all claim on any and all future renewal commissions.

It is perfectly obvious that the effect of this clause can be completely nullified by any agent who has the foresight to draw advances to the allowed limit in anticipation of leaving the society to enter the employ of another company.

The custom of making general and liberal loans to agents is in violation of economic principles, is unsound in theory, and has the possibilities of producing most injurious effects.

It has a tendency to promote "rebating" on the part of the agent. It is a temptation to improvidence, which is inevitably followed by a lowered moral tone, and in turn affects the society through the quality of its agents and its risks. It gives the agent the improper inclination to "get business at any cost" and is an important factor in permeating the agency staff with the false idea that mere bigness of business is the society's greatest goal.

It is an unsafe financial hazard. The security, while sound in many cases, is not of the character that should be negotiable. The extent of the security can never be exactly known, but must be estimated, and the best estimate is subject to demolition by unknown influences. Having started on this policy of liberal loans, the experience of the society shows that it is hard to always stop at the right point. The instances heretofore quoted show the advancing of money to agents to the extent of from two to three times the theoretical safety point established by the society itself.

Of perhaps even greater moment than the financial risk is the effect which this practice has of placing the society to an undesirable, if not actually dangerous, extent into the hands of the agents. Where credit has been extended to more than the value of the security, the lender is not in a position of independence to the borrower. The agent who borrows to an improper extent is quite apt to develop qualities which are undesirable in an agent, but the mere fact of his unsecured loan makes it impolitic to discharge him. The loan must be protected, and the agent is temporized with while the attempt is being made to nurse his account back to safety.

The committee finds that the direct and indirect advances to agents have been in many cases excessive and beyond the point of safety and prudence, and that the immediate responsibility therefor rests upon the second vice-president.

Excessive Cash Balances.

It is of course unnecessary to say that a most important factor in the conduct of a life insurance company is the investment of its assets. As a life insurance company is restricted both by prudential reasons and by law to certain conservative classes of investments, it is essential that the low rates of interest which are naturally obtained from such investments be compensated for by keeping constantly invested the greatest possible proportion—consistent with safety and convenience—of the company's assets.

The cash balances of the Equitable Society lying in United States and Canadian banks and trust companies at the end of each year from 1900 to 1904, inclusive, were:

At December 31, 1900	$16,302,712 07
At December 31, 1901	19,395,824 28
At December 31, 1902	24,624,746 34
At December 31, 1903	24,240,921 36
At December 31, 1904	20,849,895 05

The percentages which these balances bore to the society's total assets at the same dates were respectively 5.36 per cent., 5.87 per cent., 6.87 per cent., 6.38 per cent., and 5.05 per cent. The average rate of interest received by the society on these balances was 2.25 per cent.

The amounts named are large. They are not required for safety. The society is not subject to sudden or unexpected calls for unusually large sums in the regular course of its business. Such calls are not incident to the operation of life insurance, for all legitimate demands follow the known laws of averages on which life insurance is based. Aside from this general theory, the fact that large balances are not required for safety is accentuated by the fact that the regular receipts of a progressive life insurance company are always in excess of its disbursements.

Both for purposes of comparison and to illustrate the fact that other insurance companies do not consider it necessary or desirable to carry such large cash balances as has been the custom with the Equitable Society, attention is called to the fact that while on December 31, 1904, the Equitable Society held 5.05 per cent. of its assets in cash, the Northwestern Mutual had 1.84 per cent., the Connecticut Mutual 1.79 per cent., and the Mutual Benefit 1.26 per cent., of their assets so held. The Northwestern Mutual apologizes in its report for having so large a sum in bank—the words being: "The amount is larger than the company usually has, as the receipts at the close of the year were so large as to prevent prompt investment."

As stated before, the society has, as shown by its report as at December 31 of each year, had a much larger proportion of its assets in cash than has been the custom with other companies. It is also a fact that

owing to the large premium and interest receipts in the latter part of December, the general tendency among insurance companies is to have larger cash balances at December 31 than at other periods during the year.

An examination of the records of the society discloses the fact that large as are the balances at December 31, they are materially smaller than are carried at all other times during the year.

The following table illustrates this:

Year.	Average balances for 11 months, omitting Dec. 31.	Balances at Dec. 31.	Percentage of average balances for 11 months to average assets.
1900	$20,761,238 60	$16,302,712 07	
1901	27,826,727 80	19,395,824 28	8.77
1902	27,950,195 41	24,624,746 34	8.11
1903	36,120,710 82	24,240,921 36	9.78
1904	36,272,725 10	20,849,895 05	9.15

It is again illustrated by the following table of bank balances for a series of months:

Balance November 30, 1903	$37,029,350 48
Balance December 30, 1903	24,240,921 36
Balance January 31, 1904	39,677,989 19
Balance February 29, 1904	36,178,783 63
Balance March 31, 1904	37,661,367 93
Balance April 30, 1904	39,371,265 08
Balance May 31, 1904	39,225,569 42
Balance June 30, 1904	39,238,602 69
Balance July 31, 1904	34,740,203 92
Balance August 31, 1904	33,908,132 47
Balance September 30, 1904	33,562,926 16
Balance October 31, 1904	31,693,197 50
Balance November 30, 1904	33,741,988 12
Balance December 31, 1904	20,849,895 05
Balance January 31, 1905	29,072,000 83

The relation of the balance at December 31 to those of other months in the year is very clearly shown by the above exhibits; and this relation is particularly noticeable because it is directly opposed to the natural tendency of the relative balances as at December 31.

The following table shows the location of the society's funds during a period of three months, including Decem' 31, so as to illustrate the decreased balance at that date.

	November 30, 1903.	December 31, 1903.	January 31, 1904.
National Bank of Commerce, New York	$7,489,881	$5,518,164	$9,387,723
Mercantile Trust Co., New York	8,636,098	5,423,193	8,989,880
Equitable Trust Co., New York.	12,510,050	6,206,520	13,372,833
Commercial Trust Co., Philadelphia	2,401,367	2,167,880	2,435,629
Nineteen other institutions	5,991,954	4,925,164	5,491,924
Totals	$37,029,350	$24,240,921	$39,677,989

The above illustration is not exceptional, but is typical of the adjustment of balances at December 31, as compared with those at other dates.

The explanation given by the comptroller of the society for the largely decreased balances at December 31 is that it is not deemed expedient to show in the annual report such large cash balances as are usually carried, and on December 27 to 29 approximately ten millions of dollars are loaned on collaterals, being called in again on January 3 to 5, and the funds redeposited in the trust companies, whence they had been temporarily withdrawn to serve this purpose.

These conditions having been noticed by the committee, a letter was addressed to Mr. T. D. Jordan, comptroller of the society, under date of April 29, 1905, which reads as follows:

"Will you kindly furnish a statement showing the location of what you probably term unavailable funds?

"By this is meant a statement *of* the minimum balances which by agreement, understanding or otherwise you commonly maintain in each of your various depositaries."

The reply to the above, dated May 5, 1905, was as follows (the italics were not in the original, but are placed here for purpose of calling attention to the words so marked):

"In answer to your inquiry of April 29, I would state that strictly speaking the term 'unavailable funds' is unknown to us. We have always considered all our funds as available in *time of need* or *unusual necessity*. It has been our custom to carry a comparatively large balance of cash in various institutions, and we have considered it of supreme importance that a large cash reserve fund should always be maintained as a matter of principle. In selecting depositories we have generally, of course, confined ourselves to institutions in which the society has a large stock ownership for reasons which must be obvious to you, and any proper aid given them in the way of deposits redounds to the advantage of the society, and in many of these depositories we continue to carry the amounts reported, although not obligated to do so.

"In the case of the Commercial Trust Company of Philadelphia, we would not consider it equitable to draw heavily against deposits for the reason that that company is aiding the Equitable Life by assuming advances to our agents."

From this letter it is seen that while the society has the unquestioned *right* to draw on its funds, it is not expected to do so except in case of "unusual necessity."

It is further seen that it is the policy of the society to maintain large balances (so large that they are artifically decreased for exhibit on the annual reports) in those concerns in which it has a large stock interest. This fact is an illustration of the complications which attend the injudicious intermingling of two essentially different lines of finance.

It will also be noticed that the society's comptroller states it would not be equitable to materially lower its balance with the Commercial Trust Company of Philadelphia, for the reason that that concern aids the society by carrying its advances to agents. As the trust company receives 5 per cent. per annum on these advances, there would seem to be no moral obligation for the society to furnish the trust company with practically 60 per cent. of the funds required to make the loans; charging it but 3 per cent. therefor.

Summing up this subject: There are no reasons connected with the legitimate transactions of a life insurance company which require or make desirable the holding on deposit of the vast sums carried by the society. The reasons advanced in support of this practice all depend on conditions and transactions not properly included among the functions of a life insurance company, and therefore as much open to criticism as is the condition they aim to defend.

ENTANGLING ALLIANCES WITH AUXILIARY COMPANIES.

The society has acquired large, and in one case a controlling, stock interest in banks and trust companies. The theory on which the purchase of these interests was justified is that the society might thereby derive the larger profits which are possible from the class of investments which may be lawfully made by trust companies, but which may not be legally made by insurance companies.

Judging these investments either on general principles or on their specific results, their wisdom is gravely questionable.

The very foundation of these extensive stock ownerships is an attempt to do by indirect, that which may not be done by direct, means; and this in itself is a departure from that dignity which should attach to every phase of life insurance.

Having made the investment, the society finds it necessary to protect and nurse it. The society then finds itself involved with interests which, to quote the words of President Alexander, used in another connection, "Are not necessarily parallel with those of the policyholder."

In the remarks under the heading of "excessive cash balances" it has been shown that the society carries abnormal balances with those concerns in which it holds a considerable stock interest; and the society's comptroller says that the reason for this "must be obvious." The fact that the society does not carry excessive balances in institutions in which it does not have a large stock ownership indicates that these large balances are maintained for the purpose of aiding the concerns with which they are deposited. In making these investments, the society is concerned not merely in the amount it realizes in dividends as constituting a proper return on the investment, but becomes actively engaged in the building up of the auxiliary concern in order to show appreciation in market value of the original investment.

Having been committed to such a policy, complications increase, which force the society away from the position of an investor, which it should occupy, into that of a promoter and manipulator, which it should not occupy.

Under date of August 30, 1901, President Alexander writes to Mr. J. H. Hyde: "I am glad you watch the bank, and that it is doing so well, but we *must* perform some coup and increase its size and importance. Also in the case of the Mercantile. I would like to buy a couple of trust companies and double up that concern." It seems needless to state that the making of "coups" to enlarge banks or the buying of trust companies are not proper subjects of concern to a life insurance company.

Under date of July 23, 1903, President Alexander writes: "As to money, several thousand shares of stock can be bought, as you recognise, for a moderate sum of money. We are just turning over a mortgage of $300,000 to the Mercantile Trust Company, which will give us some more funds,

and we have got some further sales of bonds on the tapis. I am anxious to be ready for paying for that million dollars of securities on August 8, and I think we had better arrange in some way with Kuhn, Loeb & Co. about that Great Northern loan, which doesn't fall due until the 10th, so as to meet this."

We here see the expressed desire to purchase securities, the mention that so insignificant a sum as $360,000 is available, and the hope expressed that certain loans will be cleared off so as to provide funds, yet, on July 23, 1903, the society had no deposit nominally subject to check, the sum of $37,945,958.72.

Under date of August 13, 1903, President Alexander speaks of the unusually favorable opportunity to make investments, and then says: "We would be buying a good many such things were it not that we are so strapped for money by engagements already made," and "All this is very annoying, because if we had five or ten millions of dollars to invest now, we would make a great deal of money."

The society had on deposit August 13, 1903, $36,399,788.82. At the times when Mr. Alexander spoke of the great possibilities of making money, if it only had available funds, the society had at least twenty-five millions of dollars, which, under ordinary conditions, would have been perfectly available; but which, through alliances with other concerns, were so tied up that the opportunity was lost.

These conditions may help to explain the fact that during the five years, 1899 to 1903, inclusive, the Equitable Society realized next to the lowest average rate of interest in its invested assets of the thirty companies tabulated by the insurance year book, while in the year 1903 it stood absolutely the lowest on the list.

The foregoing has treated the subject from the standpoint of general principles. Measuring the wisdom of this class of investment by specific results, an illustration may be taken of the results to the society, for the year 1904, of its relations with Equitable Trust Company.

The book value of the society's holdings in Equitable Trust, plus its average deposits during 1904, in that institution, amount to $17,370,000. The society's income from that investment, consisting of 2 per cent. interest on deposits and 12½ per cent. dividends on the par value of its stock holdings, amounted to $390,182.00, or 2.3 per cent. on the total investment.

The claim would undoubtedly be made that in addition to the direct income, the society has greatly benefited through the appreciation of the stock over its book value. Profit through the increase in market value of a stock can be made only through the actual sale of the stock. A stock is worth no more than it can be liquidated for; and a pertinent question in this connection would be, could the society withdraw its protecting support from these auxiliary concerns and dispose of its stock holdings at present market rates? If it could not, its profits through the appreciation in stock values is at least partly fictitious.

In our opinion, the society should place its funds in such a manner that it occupies the position of an investor solely. It should purchase no bonds or stocks which require manipulation or nursing. It should make no purchases of securities where their subsequent sale could ever be unadvisable for any other reasons than general market conditions. In other words, it should be a life insurance company.

Unsystematic Methods.

During its process of examination, it has been disclosed to your committee that there does not exist in the office of the society a comprehensive system for the conduct of its business.

Starting with the fundamental error in the manner in which the authority of the board is delegated to its subordinate committees, there is found a general lack of that system by which responsibility can be fixed at its proper place.

The duties of one officer cross those of another in such a way that neither one can be held to perfect accountability.

The records of some departments are not kept in as complete a manner as the importance of the transactions demand.

The records of expenses do not centre in one final location, for ready reference, but are divided between various departments.

The different accounting officers are all sincere in giving the society their best individual efforts, but there is not that unison of direction among them required for satisfactory final results.

We deem it essential that there be a general readjustment through which the authority and duty of each general officer be definitely fixed, and through which the society's records shall become consistent and readily available for reference.

A General Summing Up.

When a careful examination of an institution discloses defects of widely different character in many different departments, a still further examination is quite apt to disclose the additional fact that, dissimilar as those defects may be, they can all be traced back to one underlying cause.

The various conditions in the Equitable Society, which have been criticised in this report, have all had their origin in one fundamental error, and that is the departure from the true principles and ethics of life insurance. This statement could be made with equal truth in regard to many other companies, and for that reason your committee feels warranted in going perhaps beyond the contemplated scope of its duties, in the hope that this report may thereby have some influence in raising the conduct of life insurance generally to a higher plane.

In its purity, the ideal life insurance company has but two objects, *i. e.*:

(1.) To furnish absolutely perfect protection.

(2.) To furnish that protection at the lowest possible cost.

The mere size of a life insurance company has no effect on its ability to furnish sound and economical protection to its individual policyholders. It is necessary that a sufficient number of lives be assured to come within the laws of average mortality, and that the volume of business be great enough to cover what might be termed the fixed charges or expenses, and to command the financial position desirable for the advantageous investment of funds.

When these objects have been attained, additional volume of business is not only unnecessary, but, if obtained at greater proportionate cost, is directly detrimental to the interest of the policyholder.

Whether resulting from a misconception of the importance of growth in size, from the competition of other companies, or from the human instinct

to excel, there has existed a disposition to lose sight of the true purpose of life insurance and devote all energies to attaining bigness.

Growth, beyond the normal rate, can be had only through unusual exertion, and this means increased cost.

The Equitable, in common with several others of the larger companies, issues the greater portion of its policies on the deferred distribution period plan. Under this system, the excess portion of the premium is not returned to the policyholder annually, but is retained by the society for various stipulated periods of years (usually twenty years) and the accumulations then paid in one sum. The advantage which is held out to the policyholder under this system is that he not only eventually receives all the natural accretions of his own policy, but shares in those which were earned by the policies of those who were unable to continue them to the end of the stipulated term. The question as to the ethics of extending the hope to one policyholder that his prosperity will be increased through the misfortune of another policyholder, is purely academic, and need not be discussed here. As each policyholder understood the conditions, and accepted them, with the hope that he would be in the fortunate class, he would seemingly be estopped from complaint if events forced him into the unfortunate class.

But, entirely aside from this question as between the individual policyholders, there can be no doubt concerning the at least potentiality of evil which this system of deferred distribution possesses.

When annual dividends are paid, the policyholder has an immediate and yearly recurring check upon the operations of his company. He is enabled and is quite apt to compare his results with those of his acquaintances insured in other companies. Extravagance in management and errors in investments are at once reflected in decreased dividends or impaired surplus.

On the other hand, the holder of a twenty years' distribution period policy has no knowledge whatever concerning the earnings of his policy until the expiration of the twenty years. He cannot make comparisons with the results in other companies, because he does not know the results in his own case. He entertains hopes for nineteen years, and, if dissatisfied with the realization at the end of twenty years, it is futile for him to protest. The incident is closed.

These conditions are mentioned for this purpose—to illustrate the *possibility* of the deferred distribution policy leading the society into a generally lax method of handling its business.

The annual dividend company is held to accountability every year. The deferred dividend company is never held to accountability by the whole body of its policyholders; and is so held by its individual policyholders only when their opportunity for action has passed.

This absence of accountability makes possible the pursuit of rapidity of growth at undue cost, because the effect of that cost is not felt by the policyholder until, as said before, it is too late for his availing protest.

Another embarrassing outgrowth from the deferred dividend system is the popular misapprehension of the so-called "surplus."

The society's published report shows a surplus as at December 31, 1904, of $80,794,269; and popular sentiment demands that this enormous sum be divided among the policyholders. There is even seen a discussion of the ownership of the surplus—as between policyholders and stockholders.

As a matter of fact, the actual surplus of the society on December 31, 1904, was approximately $10,200,000. Of the balance, $6,750,000 was apportioned for dividends payable in 1905, and $63,800,000 is merely a reserve against a future contingent liability. That is, it is the amount which has been earned by the total number of deferred dividend policies, and which becomes a direct liability as each individual policy matures.

The soliciting agents of these companies which write almost exclusively deferred dividend policies habitually state that the superiority of that form of policy is demonstrated by the fact that the public invariably selects it in preference to the annual dividend policy.

As bearing on this statement, it is of some interest to know that the Equitable Society allows its agents commissions and expenses of 50 per cent. of the first premium on deferred dividend policies, while it allows them but 25 per cent. on annual dividend policies.

The Northwestern Mutual for many years wrote almost exclusively deferred dividend policies. A few years ago it adopted the system of not requiring the insured to declare the form of distribution desired, when taking out his policy; but of sending him at the end of the second policy year a statement of his dividends, and allowing him to elect at that time whether he would take his dividends annually, or at the end of a specified period.

In 1901, the Northwestern wrote 29,223 policies. In 1903, all but 768 of these chose to take annual dividends.

In 1902, the Northwestern wrote 30,350 policies. In 1904, all but 570 chose to take annual dividends.

These facts clearly indicate that on its merits alone the public prefer the annual dividend policy, and the sentiment in favor of the deferred dividend period is artificial.

From all of the foregoing we have the departure from the true principles of life insurance by subordinating economy to rapidity of growth; and the possibility of concealing the effects of this by deferring the payments of dividends.

Following this initial departure, the other weaknesses spoken of in this report come as almost a matter of course. The ambition for bigness naturally extends to the investment of funds. There is chafing under the laws which govern the investments of a life insurance company. Alliances are made with other institutions with the idea of yielding to the society results which are not possible under the operations permitted to insurance companies. Systematic but uninteresting plodding is neglected, while energies are directed towards "coups." The final results of this have not been to endanger the financial integrity of the society, but they have lessened its earning powers and have impaired its independence.

The rush for business has magnified the importance of the agent until we find him assuming a place in the councils of the society never contemplated in its inception, and almost grotesque in its distorted proportions.

The general policy of the society having been diverted from its true course, it is hardly to be wondered at that there is found throughout its official personnel a sort of moral obliqueness—a condition where personal gain seems to be at times the paramount idea. It is this which has led your committee to find that the society's transactions with outside concerns

have so systematically been placed so that profits fall into the hands of those closely connected with the society's officers; and it is this which has led the officers of the society to say with undoubted sincerity that they saw no wrong in accepting profits from syndicate transactions in which the society played an important part.

The Society's Solvency.

While your committee has in this report freely criticised the management of the society, it wishes to here reiterate the statement of its chairman in his circular letter to the policyholders, under date of May 2, 1905, that whatever of mismanagement may have existed in the society, has in no way impaired its condition of perfect solvency as shown in its annual report.

We are of the opinion that the values at which some of the society's holdings of real estate are carried on its books are too high—particularly in regard to some of its own office buildings. We are also of the opinion that in a final settlement there will be some losses through the advances to agents. But no imaginable shrinkage in the value of these, or of any of its other assets, could impair the society's ability to promptly meet its every maturing obligation.

The correction of the faults of management of which we have spoken should not only aid every policyholder by decreasing his cost of insurance, but should give added strength to the society's already strong financial position.

Recapitulation.

Beginning with the petition of James W. Alexander, Gage E. Tarbell, and other officers of the Equitable Society, dated February 2, 1905, requesting the board of directors to enfranchise, in the election of directors, the holders of policies of $5,000 and more, as provided by the society's charter, and requesting that legal steps be taken to enfranchise "all classes of beneficiaries"; and the amended petition of February 7, 1905, requesting that the directors should not reelect Mr. Hyde as vice-president, the committee has endeavored to trace the history of the issues raised by these petitions down to the time when they were settled by the board of directors adopting a new charter and by reelecting Mr. Hyde, together with his associates, in the organization during the last fiscal year.

The committee finds that the attack made by the officers upon Mr. Hyde was designed to further their plan to mutualize the society. The fact that the persons making the attack, to the extent that they were directors in the society, joined in the reelection of Mr. Hyde concurrently with the adoption by the board of a scheme of mutualization, seems conclusive upon this point.

In other words, they were willing to have Mr. Hyde fill the responsible office of vice-president, notwithstanding the gross irregularities of which they alleged he was guilty, provided their own views were met upon the other question.

The committee then took up all the charges against the directors, committees, and officers of the association for the purpose of determining what it conceived to be its duty, to wit: the character of the present management of the society.

THE DIRECTORS.

Beginning with the source of power in the society, namely, the directors, the committee finds:

(1.) That the title of the great majority of the board to their office as directors is open to question under the law of the society by reason of the fact that the shares of stock held by them were transferred to them for the purpose of qualifying them as directors.

(2.) That this practice of qualifying directors is almost coeval with the existence of the society itself, and, further, that there has not been a time for years when there were enough male stockholders in the corporation owning five shares of stock to constitute the number of directors required by the charter; indeed, at the present date not more than half enough for that purpose.

(3.) That the directors, in whom the corporate powers of the society are vested by its charter, created, by the by-laws, certain committees and officers to whom the directors delegated the exercise of substantially all the powers of the society.

The committee further finds that the relation of the board of directors to the exercise of the society's powers has been practically nominal since the establishment of the society.

(4.) That the directors are responsible for constructing the executive and finance committees of the same persons (except one) thus destroying the check upon and the supervision over the executive committee which the by-laws provide shall be exercised by the finance committee. The committee recommends the reorganization of these committees.

THE EXECUTIVE COMMITTEE.

(5.) That the minutes of the proceedings of the executive committee have not been kept in the manner provided by the by-laws, and that in the conduct of its business there has been a marked absence of that formality which is proper, if not essential, in dealing with a trust of such great magnitude.

(6.) That the members of the executive committee named in Mr. Hyde's letter to the committee of April 27, 1905, participated with Mr. Hyde in the profits of the syndicates, detailed in said letter, and are justly indebted to the society for the amount of said profits.

THE PRESIDENT.

(7.) As to the president of the society the committee finds that he concealed from the board of directors his knowledge of the irregular conduct of the vice-president in relation to the society's affairs at times when the vice-president was a candidate for reelection, and that the president had knowledge of these irregularities, to the extent that the committee finds they existed, and that many of these irregularities were openly encouraged and participated in by the president.

(8.) That the president failed to bring to the attention of the directors, the executive committee, or the finance committee his knowledge of the vice-president's wrongful acts as detailed in the president's specific charges of May 2d.

(9.) That the president participated in the profits of the syndicates of "James H. Hyde and Associates," as detailed in Mr. Hyde's letter of April 27, 1905, and that he is justly indebted to the society in the amount set out in said letter, and that he had knowledge of the syndicates and their purposes, and that as a member of the executive committee he in many instances participated in the acts of the committee in authorizing the purchase of securities in which he was interested as a member of the banking syndicate making the sale.

THE VICE-PRESIDENT.

(10.) As to the vice-president, the committee finds that he habitually involved the society in transactions of great magnitude without the previously obtained authority of the executive committee; that he carries large amounts of stocks belonging to the society in his own name without first having secured the authority of the society; that he used the funds of the society to pay for the "Cambon dinner" (which he subsequently returned); that he conducted and participated in the profits of the syndicates described in his letter of April 27, 1905, having frequently as a member of the executive committee voted for the purchase of such securities as shown in said letter in detail; that he is indebted to the society to the amount of the profits he has received as shown by his letter; and that he has been guilty of other irregular acts, irregular in the sense that they are not in accordance with the society's law or with sound business practices, treating the society and its affairs largely as if they were his own personal concern.

(11.) As to the other officers of the society, the committee finds that a general looseness has prevailed in the administration of the society's affairs, requiring prompt and thorough rectification, and that there is a general lacking in the organization of that strong moral fibre so essential for the accomplishment of satisfactory results.

(12.) The committee also finds that the society's methods of doing business are unsystematic and should be corrected; that the cash balances carried by the society are excessive; that the society's alliances with financial institutions are unnecessary and undesirable in the conduct of its legitimate business; that its advances to agents, directly and through financial institutions in which the society is interested, are excessive, and that the society's efforts should be directed to conducting a strictly legitimate life insurance business at the lowest cost to the insured along the general lines hereinbefore indicated.

The imperative need in this and all other similar associations is a more lively sense of the true nature of the relations existing between the society and the assured and of the duties owing by the management to both.

When we consider the fabulous accumulations held by such associations represent a voluntary tax placed by the provident upon their lives, and when we recall the tremendous self-denial and sacrifice that is represented in daily living to secure provision against the inevitable, then we begin to realize the high and delicate nature of the trust involved in the administration of such a fund.

Every economy consistent with sound administration and normal progress should be practised. Excessive salaries, excessive commissions, excessive expenses and superfluous offices should not be tolerated.

Investments should be carefully made, and all the useful formal precautions employed to insure the location of the moral responsibility of the officers who are charged with the duty of making them.

The committee having pursued its investigation of the present management of the society sufficiently far to convince it that the personnel of the management should be radically changed, and the methods of conducting the business of the society brought back to sound legal and ethical lines, begs to be relieved from further duty.

The committee desires, however, to recommend that further investigation, as indicated in its chairman's letter of April 8 to Mr. Alexander, which the committee did not find necessary to pursue before making this report, be proceeded with by a reorganized management, whose immediate connection with the sources of information, undivided time for the work, and personal responsibility for the future management, will enable them to conduct the investigation more thoroughly, expeditiously, and satisfactorily, than it would be possible for the committee to do. The committee also recommends that the new management have a thorough audit made of all the society's books and records.

If other irregularities in the present management are brought to light they will be only cumulative and therefore could not affect, one way or the other, the finality of the conclusions expressed above.

The extraordinary powers of the principal officers of the society carry with them the highest measure of responsibility. The committee finds that of these the president, vice-president and the second vice-president have fallen far short of their duty both in acts of commission and omission, and changes in these officers should be made. The loose and irregular methods obtaining in the management are largely due both to the example of the acts and the example of the neglect of these officers. The shortcomings in inferior executive officers are largely due to the methods which the principal officers have encouraged or permitted, and so far as correction of these irregularities calls for further removals of officials, that matter should be dealt with and largely controlled by the judgment of the reorganized management.

Respectfully submitted.

H. C. FRICK, Chairman.
E. H. HARRIMAN,
BRAYTON IVES,
CORNELIUS N. BLISS,
M. E. INGALLS.

The various letters referred to in this report are filed herewith.

In pursuance of the resolution of the board of directors, passed after a discussion of the investigating committee's report at the meeting of May 31, 1905, which resolution reads "On motion of Mr. Cassatt, seconded by Mr. Forgan, it was resolved that the investigating committee be re-

quested to supplement their report, at the meeting on Friday, with such recommendations as they deem wise," the committee makes the following recommendations:

First. That so much of the report as discusses the principles and ethics of life insurance, and the methods of conducting the business of life insurance, be taken under consideration by the president of the society under a new organization, in connection with such other officers of the society and expert advisers as he may choose, and that report be made thereon, with recommendation to the board at as early a day as possible.

Second. The committee also recommends that the board authorize the committee to publish their report.

Third. That the president, vice-president, and second vice-president be requested to forthwith resign their respective offices.

Fourth. The committee also recommends that a committee of seven, consisting of John A. Stewart, D. O. Mills, T. Jefferson Coolidge, A. J. Cassatt, August Belmont, J. B. Forgan, and Robert T. Lincoln, be appointed to nominate a president, vice-president, and second vice-president, to report to the board at a meeting to be held on ————, 1905.

H. C. FRICK, Chairman.
E. H. HARRIMAN,
BRAYTON IVES,
CORNELIUS N. BLISS,
M. E. INGALLS.

June 2, 1905.

PRELIMINARY REPORT

OF THE

INVESTIGATION INTO THE MANAGEMENT

OF

The Equitable Life Assurance Society of the United States

MADE TO THE

GOVERNOR OF THE STATE OF NEW YORK

BY THE

SUPERINTENDENT OF INSURANCE

AS OF JUNE 21, 1905

WITH ADDENDUM COVERING MATTERS REFERRED TO THEREIN

THE SPECTATOR COMPANY
135 WILLIAM STREET
NEW YORK

STATE OF NEW YORK,

INSURANCE DEPARTMENT,

ALBANY, *June* 20, 1905.

To the Honorable FRANK W. HIGGINS, *Governor of the State of New York:*

Sir—The Equitable Assurance Society of the United States is one of the largest insurance companies of the country. It was examined by the Insurance Department in the year 1901 and found entirely solvent. Its annual report for the year 1904 shows that it was financially sound, had a large surplus and was in a prosperous condition. It was therefore a great surprise to me as well as to the public generally when internal dissension arose in this institution. It started in the Equitable Building, the home office of the Society, in the city of New York, and among its directors and highest officers.

The annual meeting of the Board of Directors was held on the 8th day of February, 1905. At that meeting the president of the Society, Mr. James W. Alexander, presented a petition, dated February 2, 1905, signed by himself and thirty-three other officers of the Society, praying that policyholders, holding policies of $5,000 or upwards, may be empowered to vote for directors as provided for in the charter, which amounted to partial mutualization. He filed with that petition an opinion signed by five eminent lawyers, to the effect that the directors had the requisite power and authority to confer upon such policyholders the right to vote at the annual election of directors. He also submitted a draft of a proposed amended charter and with it filed a written opinion of these same lawyers, dated February 7, 1905, advising that it could be lawfully adopted by a vote of a majority of the directors. At the same meeting the president submitted another petition, dated February 7, 1905, and signed by himself and thirty-eight other officers of the Society, protesting against the re-election of Mr. James H. Hyde as vice-president. The Board of Directors took these petitions and opinions under advisement, and at a subsequent meeting all the officers of the preceding year were re-elected, com-

mittees were appointed and the Board adjourned. The proposed amended charter was not adopted, and while some effort in that direction was made nothing was accomplished toward the mutualization of the Society.

In the meantime Mr. Alexander submitted to a committee of the Board, known as the Committee of Twelve, a long statement in favor of mutualization and criticising certain actions of James H. Hyde as Vice-President. Mr. Hyde quickly replied with a long communication to the Board of Directors, defending his rights as the owner of the majority of the stock and explaining his conduct as Vice-President. Thereupon the Board of Directors divided into factions, also the officers of the Society, charges and counter-charges were made, criminations and re-criminations followed. The press took up the controversy and continued to publish startling statements as to the management of the Society, to such an extent that the policyholders of the Society became alarmed as to its solvency and their fears excited as to the assets of the Society being dissipated by the officers. The Superintendent of Insurance thereupon determined to make an examination of the Society to determine its financial condition, and for that purpose appointed Robert H. Hunter, First Deputy of the Department, and Isaac Vanderpoel, Chief Examiner of the Department. Later, on account of charges that were made by the President of the Society of misconduct on the part of some of its officers, it was determined to make an investigation of these charges and of its business management, which I personally conducted with the aid of the Honorable M. E. Driscoll as special counsel.

Section 39 of the Insurance Law of the State of New York provides as follows:

"The superintendent of insurance shall, as often as he deems it expedient, appoint one or more competent persons not officers of or connected with, or interested in any insurance corporation doing business in this state, other than as a policy holder, as examiners to examine into the affairs of any such corporation. Such examiners may examine under oath the officers and agents

of any such corporation and its books, with reference to its business. Such corporation, its officers and agents, shall produce its books and all papers in its or their possession relating to its business or affairs for the inspection and examination of such examiners whenever required; and shall facilitate such examination and aid the examiners in making the same so far as it is in their power to do so."

Many of the officers and directors of the Society were thereafter from time to time examined by me under oath and their evidence reduced to writing. I examined many of the Society's deeds, mortgages, leases, records and accounts, and in short all papers and documents which seemed to me necessary or pertinent to the inquiry, and in addition copies of all reports, proceedings, letters and papers of every kind which were furnished to the Frick Committee from time to time, were submitted to me for examination.

After reading such papers and documents and the evidence taken before me, and after due consideration, I respectfully submit the following report:

The Equitable Life Assurance Society of the United States was incorporated in the year 1859 pursuant to the provisions of an act entitled "An act to provide for the incorporation of life and health insurance companies, and in relation to agencies of such companies," passed June 24, 1853, and the amendments thereto. The provisions of its certificate of incorporation commonly known as its charter, which are pertinent to this inquiry and may be interesting to its policyholders, are:

"Article 3. The capital of said company shall be one hundred thousand dollars in cash, divided into one thousand shares of one hundred dollars each; which shall be personal property, transferable only on the books of the company, in conformity with its by-laws. The holders of the said capital stock may receive a semi-annual dividend on the stock so held by them, not to exceed three and one-half per cent. of the same, such dividends to be paid at the times, and in the manner designated by the directors of

said company. The earnings and receipts of said company, over and above the dividends, losses and expenses, shall be accumulated.

"Article 4. * * *

"The board of directors shall consist of fifty-two persons, a majority of whom shall be citizens of the State of New York, each of whom shall be a proprietor of at least five shares of the said capital stock.

"The board of directors may, previous to any annual election, and after giving notice at the previous meeting of the board, provide for diminishing the number of directors to not less than twenty-four, in which case one-fourth of the total number, as thus diminished, shall be elected annually, in the same manner as hereinafter provided, in regard to the fifty-two directors above named; and the same powers and authority shall vest in said board of directors, thus diminished, as were previously exercised by the former board of directors.

* * * * * * * * * * * *

"In the election of directors, every stockholder in the company shall be entitled to one vote for every share of stock held by him, and such vote may be given in person or by proxy. At any time hereafter, the board of directors, after giving notice at the two previous stated meetings, may, by a vote of three-fourths of all the directors, provide that each life policyholder, who shall be insured in not less than five thousand dollars, shall be entitled to one vote at the annual election of directors, but such vote shall be given personally, and not by proxy.

"The board of directors shall have power to declare, by by-law, what number of directors, not less than seven, shall constitute a quorum for the transaction of business.

* * * * * * * * * * * *

"Article 6. The insurance business of the company shall be conducted upon the mutual plan."

This charter has never been amended. By-laws were adopted in pursuance of the provisions of the charter and have been amended from time to time. Fifty-two directors were named in the Society's charter and the same number has been continued until the present time.

With this Charter and Board of Directors, the Society started in business. The late Henry B. Hyde, father of James H. Hyde, was its founder and leading personality in its creation and growth until the time of his death, which occurred in May, 1899. Early in the history of the Society he secured a majority of the stock, which he constantly held and transmitted by deed of trust to his son. By reason of his stock control and his commanding ability he absolutely dominated the Society in all directions. He was possessed of untiring energy and zeal. He worked early and late and inspired others with much of his own enthusiasm and enterprise. He watched over its affairs in all directions and even solicited insurance on the streets. Under his direction and management the Society grew in public confidence, and before his death it became one of the largest and most extensive insurance companies in the world. But he did not neglect his own interests or those of his immediate associates and dependents in the Society. As business increased and money began to flow into the treasury, and the real or apparent surplus began to grow, he conceived the idea of constructing or buying office buildings in the larger cities in this country and also in Europe. They were claimed to be a useful advertising medium, in impressing the policyholders and general public with the large surplus, substantial property and wise conservatism of this institution. But they incidentally served another and more selfish purpose.

The Mercantile Safe Deposit Company.

The present home office building at 120 Broadway, New York City, was the first of these, and it occurred to Mr. Hyde that its lower floor would be a convenient and desirable place for safe deposit vaults, and that such business would be profitable. He therefore, some time prior to the 1st day of January, 1876, organized a corporation known as the Mercantile Safe Deposit Company, and on the 1st day of January, 1876, the Society leased to this Mercantile Safe Deposit Company rooms and accommodations in the Equitable Life Building. The lease was for

twenty-five years, from January 1, 1876, until January 1, 1901, with the privilege to the lessee of renewing it for twenty-five years more at the expiration of that period. The annual rent reserved was as follows: The first fifteen thousand dollars received by the tenant as net rental for said vaults, safes, places of deposit, after the payment of all expenses, went to the landlord; the second fifteen thousand dollars went to the tenant, and the balance was equally divided between the landlord and the tenant.

This lease was executed on the part of the Society by H. B. Hyde, President, and attested by Samuel Borrowe, Secretary. Thereafter and on the 9th day of January, 1883, seventeen years before the expiration of the lease above referred to, the Society made a new lease with this same tenant with no apparent reason, unless it may be to extend the term and have another officer than H. B. Hyde execute it on the part of the Society. This second lease provides for the same rent and contains substantially the same conditions as the one for which it was substituted. It was to terminate on the 1st day of January, 1901, but provided for two renewals at the option of the lessee of fifty years each, which will continue it until the year 2001, on the same terms and conditions contained in the old lease. This lease was signed on the part of the Society by James W. Alexander, Vice-President, and William Alexander, Secretary. (See Exhibit 1, Addenda.)

Thereafter and on the 14th day of April, 1888, the Society leased to this same tenant several additional rooms and extra space of large rental value with no additional rent. This instrument was executed on the part of the Society by James W. Alexander, Vice-President, and William Alexander, Secretary.

Again and on the 8th day of October, 1900, the Society entered into another lease with this same tenant, which was really the exercise of a renewal option contained in the former lease. This instrument was executed on the part of the Society by James W. Alexander, President, and George T. Wilson, Third Vice President. The Safe Deposit Company is now in possession under this last lease. All these leases provide that the lessor must make all improvements, alterations and repairs, and must light,

heat, water, janitor, watch and clean the premises and incur all expenses for care and maintenance. Yet it receives only one-half of the net rental from the vaults, boxes and places of deposit, whereas it should receive all. It may be claimed that the Safe Deposit Company ran some risk in agreeing to pay $15,000 per annum in any event. Not so. It took no chances, for the net rents received by it from these vaults, etc., during the first year were $66,474.92, and the lowest net rental since that time was $47,414.18. Besides the landlord paid all expenses, so that there was no chance to lose and every chance to win, on the side of the tenant.

From the year 1877 to 1904, both inclusive, the Mercantile Safe Deposit Company paid to the Society as rent the sum of $1,033,846.46 in annual payments ranging from $23,707.09, the lowest, to $46,535.04, the highest. The statements which we received from the Society do not show the payments made or expenses incurred for alterations in, and additions to, the premises occupied by the Mercantile Safe Deposit Company prior to the 17th day of September, 1890, but they do show an outlay by the Society on the vaults, boxes, rooms, etc., leased by this tenant from September 17, 1890, to December 31, 1904, inclusive, of $479,909.45. The rents received from the Safe Deposit Company for the same period were $483,372.94, showing a balance in favor of the landlord of only $3,463.49. But when we take into account the expenses for heat, light, water, janitors, watchmen, cleaning, elevators, etc., it is manifest that the Society suffered a great loss, whereas the gentlemen interested in the Safe Deposit Company have been reaping enormous profits. The capital stock of $300,000 has been paying 29 per cent. dividends, all at the expense of the parent company; and this will continue for ninety-six years to come.

The Security Safe Deposit Company.

Manifestly, Henry B. Hyde was pleased with the safe deposit business and concluded to extend and improve it. The Equitable Society, therefore, bought or erected a building in Boston, Mass.,

and leased an adjoining building from one Charlotte A. Johnson for the use of the Society. He and his associates organized a corporation under the laws of Massachusetts and named it the "Equitable Safe Deposit Company," and on January 1, 1880, The Equitable Life Assurance Society leased to this company an outfit of rooms, vaults, boxes, and general accommodations for safe deposit business, partly in the building which it owned and partly in the building which it leased. This lease is better—$16,000 a year better—to the tenant than the one to the Mercantile Safe Deposit Company. By it the Safe Deposit Company rents out or sublets the vaults, safes, boxes and places of deposit and pays all expenses incurred in the same. The balance or net rental is divided as follows: The first $100 go to The Equitable Society; the next $16,000 go to the Safe Deposit Company; and if the net income exceeds $16,100 per annum, The Equitable Society gets half the surplus until one-half of such surplus together with the $100 reaches $20,000, when the rights of The Equitable Society cease, and the tenant gets all the remainder. The maximum amount which the Society can receive is $20,000 in any one year, and when it receives that amount the tenant receives $36,000 and all surplus. The lease provides for three renewals of twenty-five years each at the option of the lessee, which will continue it in force until the first day of January, 1980, and then for a renewal of one hundred years from that date, at the option of the lessee, which will continue it in force until the first day of January, 2080. It was executed on the part of the Society by Henry B. Hyde, President, and Samuel Borrowe, Secretary. (See Exhibit 2, Addenda.)

It seems that on or before the eighth day of November, 1888, another corporation known as "The Security Safe Deposit Company," was organized under the laws of the State of Massachusetts which succeeded to the rights of the Equitable Safe Deposit Company, and that the Equitable Society had constructed a new building in the City of Boston. Therefore on the eighth day of November, 1888, the Society entered into a new lease of the basement and ground floor of the new building in addition to the space

already occupied by the Equitable Safe Deposit Company. The Equitable Society simply added the ground floor and basement to the space occupied under the old lease, without receiving or apparently asking any additional rent or compensation. This lease was executed on the part of the Society by James W. Alexander, President, and William Alexander, Vice-President. (See Exhibit 3, Addenda.)

Again on the twentieth day of December, 1904, the Society by a supplemental lease added some new space and accommodations to the rooms and space occupied by the lessee without any additional rent or compensation, and this instrument was executed on the part of the Society by James W. Alexander, Vice-President, and William Alexander, Secretary.

No one would anticipate that such an arrangement would prove profitable to the Society, and the expected has happened. According to a statement furnished us by the officers of the Society, the receipts of rent from the Equitable Safe Deposit Company and the Security Safe Deposit Company, its successor, from the year 1878 to the year 1904, both inclusive, amounted to $168,285.26. This statement contains no items of expenditure prior to the ninth day of January, 1891; but the expenditures and payments made by the Society on account of alterations and additions in and for the Security Safe Deposit Company from that date to and including the sixteenth day of May, 1904, was $162,045.96, very much more than the rent received during that period. The Safe Deposit Company has received $168,285.26, the same as the Equitable Society, and the additional sum of $16,000 a year since January 1, 1880, amounting to $300,000, or a total of $468,285.26, while the Equitable Society has paid out many thousands of dollars for additions and improvements in these vaults, safes, places of deposit, more than it has received, and has also incurred all expense for light, heat, water, elevator, janitors, watchmen, cleaning, etc. With this sort of a "jug-handled" lease it is not surprising that the real estate pays the Society only 1.58 per cent. on the whole building, while the stock of the Security Safe Deposit Company pays its owners 18 per cent. on its capitalization of $200,000.

"THE MISSOURI SAFE DEPOSIT COMPANY."

The late Henry B. Hyde, who by this time had become a firm believer, and an expert, in safe deposit business, concluded he could improve on the Boston lease by $4,000 a year in favor of himself and his friends, and to the loss of the Society. Therefore, prior to the ninth day of November, 1888, he caused The Equitable Society to purchase an office building in the City of St. Louis, Missouri, and organized a corporation under the laws of that State, and named it "The Missouri Safe Deposit Company," and on the ninth day of November, 1888, he caused The Equitable Society to make a lease to this corporation. This lease was executed by James W. Alexander, President, and William Alexander, Secretary. (See Exhibit 4, Addenda.)

By this lease the Missouri Safe Deposit Company rents out or sub-lets the vaults, safes, boxes and places of deposit, and pays all expenses incurred in the same. The balance or net rental is disposed of as follows: The first $100 go to the Equitable Society, the next $20,000 go to the Safe Deposit Company, and if the net income exceed $20,100 per annum, one-half of such excess goes to the Equitable Society and one-half to the Safe Deposit Company, until such one-half, together with the $100 amounts to $20,000, which is the maximum rent which the Equitable Society can receive, and all excess above that goes to the Safe Deposit Company. Let it be understood that the Society receives nothing under this lease except $100 a year until after the Safe Deposit Company has received $20,000 per annum, above all expenses, while the Society keeps up all additions and improvements at its own expense. Thereafter and on December 20, 1894, The Equitable Society leased to this Safe Deposit Company two additional rooms without any additional rent. (See Exhibit 5, Addenda.)

Under this lease the Society received in rents from 1886 to 1894, for these premises, which were worth many thousands of dollars annually, the magnificent sum of $100 dollars a year, and from 1895 to 1904 it received $300 a year. There is no apparent reason why the rent was jumped from one to three hundred dollars at

once, except possibly to give these gentlemen an opportunity, in case of a superficial inquiry, to say that the rent was increased 200 per cent.

From 1886 to 1904, inclusive, the Society received the total rental of $3,900, while from the 16th day of February, 1891, to the 9th day of May, 1905, inclusive, it paid out on account of alterations, additions, repairs, etc., for these premises occupied by this Safe Deposit Company the sum of $33,131.40, and in addition thereto, during the whole term of the lease, the Society incurred the expense of heat, light, water, janitors, watchmen, elevators and cleaning. The amount expended by the Society on these leased premises prior to February 16, 1901, does not appear. The Society has realized only 1.86 per cent. on its valuation of this building (much less than the investment), while the tenant had its premises practically rent free, and received very large profits from the time of its organization until the stock of the Missouri Safe Deposit Company was sold to the Society in the year 1902.

The leases by the Equitable Society to these three safe deposit companies are very much alike. They all contain provisions with reference to arbitration in case of a disagreement between the parties as to the expenditures of the lessee. Three arbitrators are to be chosen, one by the lessee, one by the lessor and the third by the two so chosen, and the decision of such arbitrators shall be final and conclusive upon the parties. When it is clearly understood that the gentlemen who caused the Society to make these long leases at great loss to the Society are the same men who reap the profits from the leases, it is manifest that if ever an arbitration question should come up as a matter of form, the Society's interests would not be looked after. That is all that need be said.

These leases are all so one-sided, unfair and unjust to the Society that it is practically impossible to convey a clear idea of all their provisions by any extract which may be made; for it is difficult to believe that trustees of a sacred trust would make such contracts against the welfare of the Society and in their own

interests. In order that the policyholders may read for themselves, if they desire, and see the kind of leases which the Society has been making, copies of them are appended to and made a part of this report.

(See Exhibits 1 to 5, Addenda.)

But who were the gentlemen who realized these profits? The Missouri Safe Deposit Company was capitalized at $200,000, consisting of 2,000 shares of $100 each, and the following is a list of the original subscribers to that stock and the amounts of their subscriptions:

	Shares.
Henry G. Marquand	200
Henry G. Haarstick	5
D. K. Ferguson	5
George W. Allen	5
George D. Capen	5
William Nichols	5
James Jauncey Hoyt	5
William Alexander	25
Louis Fitzgerald	1,745
	2,000

Two hundred shares appear in the name of Henry G. Marquand. The six following seem to be qualified directors holding five shares each. William Alexander, the Secretary of the Equitable Society, took 25 shares, and Louis Fitzgerald took the great bulk of the stock, 1,745 shares. This gentleman was the intimate friend of the late Henry B. Hyde and for many years was Chairman of the Executive and Finance Committees of the Equitable Society. We have sent for Mr. Fitzgerald to tell us who the real owner of this stock was, but he has not appeared. It may be assumed that most of it was owned by Henry B. Hyde himself, for while he favored his intimate friends on the inside at the expense of the Society he kept the lion's share himself.

President James W. Alexander and other officers who appeared before us explained that in the year 1902 the Society was negotiating the sale of this St. Louis building, but that the proposed purchaser refused to take it on account of this long and one-sided lease. It was on that account deemed wise on the part of the Society to purchase all the stock of the company so that it might own both the building and the stock and terminate the lease at will. It was therefore agreed upon to pay the stockholders $250 per share which was estimated on a basis of four per cent. The stock was paying dividends of ten per cent. per annum. All of the stock was bought in by the Society at that figure. James H. Hyde was the owner of a large majority, for on June 2, 1902, he sold to the Society 1,410 shares at $250 a share and received in cash $352,500.

James W. Alexander says he signed these leases under the direction of Henry B. Hyde. I believe that to be the fact, and it is the most charitable construction which can be placed upon his acts.

The following statement submitted to us by the officers of the Society is here inserted. It tells the story how the officers of the Society profited through these safe deposit companies.

Rents Received from Mercantile Safe Deposit Co. of New York, Security Safe Deposit Co. of Boston, Mass., Missouri Safe Deposit Co. of St. Louis, Mo.

	Mercantile Safe Deposit Co.	Security Safe Deposit Co.	Missouri Safe Deposit Co.
1876	.....	.....	.....
1877	$33,237 46	.....	.....
1878	23,707 09	$1,787 63	.....
1879	32,065 72	.....	.....
1880	34,079 69	100 00	.....
1881	42,208 33	100 00	.....
1882	43,321 71	145 38	.....
1883	46,535 04	836 38	.....
1884	45,206 23	1,693 26	.....
1885	45,706 81	2,415 87	.....
1886	45,851 48	4,046 84	$100 00
1887	43,066 51	5,296 69	100 00
1888	41,042 22	6,526 16	100 00
1889	42,111 03	7,698 56	100 00
1890	41,910 45	8,744 56	100 00
1891	44,493 11	5,619 14	100 00
1892	32,695 71	5,941 30	100 00
1893	34,989 30	7,137 28	100 00

	Mercantile Safe Deposit Co.	Security Safe Deposit Co.	Missouri Safe Deposit Co.
1894	$34,447 65	$6,095 69	$100 00
1895	29,815 08	5,858 96	300 00
1896	32,021 52	7,257 31	300 00
1897	32,645 39	8,805 89	300 00
1898	28,189 06	9,390 75	300 00
1899	38,197 06	10,469 57	300 00
1900	36,439 29	11,029 45	300 00
1901	37,063 12	11,530 56	300 00
1902	38,954 01	12,993 00	300 00
1903	29,966 81	12,418 11	300 00
1904	23,879 57	14,346 98	300 00
	$1,033,846 46	$168,285 26	$3,900 00

Payments Made on Account of Alterations and Additions, Mercantile Safe Deposit Co. of New York.

New North Vault:

J. B. & J. M. Cornell, 18th and final payment, Feb. 15, 1905	$500 00
J. B. & J. M. Cornell, 17th payment, April 27, 1904	5,000 00
J. B. & J. M. Cornell, 16th payment, March 7, 1904	7,500 00
J. B. & J. M. Cornell, 15th payment, Jan. 21, 1904	10,000 00
J. B. & J. M. Cornell, 14th payment, Dec. 16, 1903	15,868 63
J. B. & J. M. Cornell, 13th payment, Sept. 18, 1903	5,968 80
J. B. & J. M. Cornell, 12th payment, July 27, 1903	5,874 52
J. B. & J. M. Cornell, 11th payment, July 1, 1903	5,367 10
J. B. & J. M. Cornell, vault work, 10th payment, May 8, 1903	7,220 60
J. B. & J. M. Cornell, vault work, 9th payment, April 8, 1903	7,300 05
J. B. & J. M. Cornell, vault work, 8th payment, March 27, 1903	10,000 00
J. B. & J. M. Cornell, vault work, 7th payment, Feb. 20, 1903	8,710 65
J. B. & J. M. Cornell, vault work, 6th payment, Jan. 14, 1903	8,043 90
J. B. & J. M. Cornell, vault work, 5th payment, Dec. 10, 1902	7,311 00
J. B. & J. M. Cornell, vault work, 4th payment, Nov. 12, 1902	14,013 69
J. B. & J. M. Cornell, vault work, 3d payment, Oct. 15, 1902	22,020 28
J. B. & J. M. Cornell, vault work, 2d payment, Sept. 4, 1902	45,031 49
J. B. & J. M. Cornell, vault work, 1st payment, Aug. 20, 1902	13,060 29
	$198,800 00
J. M. Mossman, 4th and final payment, Oct. 26, 1904	$3,232 78
J. M. Mossman, 3d payment, Sept. 15, 1904	52,500 00
J. M. Mossman, safe deposit boxes, tin boxes and locks, 2d payment, May 13, 1904	9,678 45
J. M. Mossman, safe deposit boxes, tin boxes and locks, 1st payment, March 25, 1904	40,000 00
	$105,411 23
J. B. & J. M. Cornell, iron shutters, March 7, 1904	$490 00
J. B. & J. M. Cornell, steel plates, etc., Feb. 15, 1905	183 50
J. B. & J. M. Cornell, in addition to contract, iron lintels, etc., Feb. 15, 1905	88 40
J. B. & J. M. Cornell, in addition to contract, bronze ceiling, Feb. 15, 1905	3,601 24
J. B. & J. M. Cornell, in addition to contract, dragon sign, Feb. 15, 1905	450 00
	$4,813 14

New Vaults Nos. 1, 2, 3:

J. B. & J. M. Cornell, 5th and final payment, Dec. 4, 1903	$2,017 24
J. B. & J. M. Cornell, 4th payment, July 27, 1903	4,703 10
J. B. & J. M. Cornell, vault work, 3d payment, June 10, 1903	5,048 40
J. B. & J. M. Cornell, vault work, 2d payment, May 8, 1903	3,873 90
J. B. & J. M. Cornell, vault work, 1st payment, April 8, 1903	12,922 36
	$28,565 00

Payments Made on Account of Alterations and Additions, Mercantile Safe Deposit Company of New York.

J. B. & J. M. Cornell, iron work	$2,284 81,	paid Oct. 8,	1890
J. B. & J. M. Cornell, vault work	25,000 00,	paid Nov. 17,	1890
J. B. & J. M. Cornell, vault work	25,000 00,	paid July 8,	1891
J. B. & J. M. Cornell, safe deposit boxes	20,000 00,	paid Sep. 1,	1891
J. B. & J. M. Cornell, safe deposit boxes	13,132 38,	paid Feb. 12,	1892
J. B. & J. M. Cornell, guards	945 00,	paid Jan. 23,	1895
J. B. & J. M. Cornell, safe deposit boxes	1,148 00,	paid Sep. 25,	1897
J. B. & J. M. Cornell, iron grilles	349 00,	paid May 31,	1899
J. B. & J. M. Cornell, 2 safes	640 00,	paid June 20,	1900
J. M. Mossman, time lock, vault V	275 00,	paid Feb. 26,	1890
J. M. Mossman, combination locks	300 00,	paid July 2,	1890
J. M. Mossman, door guards	135 00,	paid Sep. 17,	1890
J. M. Mossman, 5 safes	1,960 00,	paid June 27,	1891
J. M. Mossman, safe deposit locks	7,800 00,	paid Sep. 1,	1891
J. M. Mossman, refinishing	2,330 22,	paid Dec. 22,	1891
J. M. Mossman, door and vestibule	2,005 20,	paid Jan. 8,	1892
J. M. Mossman, safe deposit boxes	2,403 90,	paid Feb. 12,	1892
J. M. Mossman, license for 2 sills	200 00,	paid Aug. 17	1892
J. M. Mossman, door and vestibule	525 00,	paid May 25,	1892
J. M. Mossman, iron closets	225 00,	paid May 17,	1893
J. M. Mossman, closets	1,095 27,	paid Feb. 28,	1894
J. M. Mossman, safe deposit boxes	3,813 25,	paid Aug. 29,	1895
J. M. Mossman, number plates	500 00,	paid Aug. 29,	1895
J. M. Mossman, safe deposit locks	2,220 80,	paid Aug. 29,	1895
J. M. Mossman, safe deposit boxes	1,891 00,	paid Nov. 11,	1896
J. M. Mossman, safe deposit locks	208 00,	paid Nov. 11,	1896
J. M. Mossman, safe deposit locks	1,263 30,	paid Sep. 1,	1897
J. M. Mossman, safe deposit boxes	4,196 35,	paid Sep. 13,	1899
J. M. Mossman, safe deposit boxes	3,054 19,	paid Aug. 15,	1900
J. M. Mossman, safe deposit boxes	2,468 79,	paid Aug. 15,	1900
J. M. Mossman, safe deposit boxes	585 40,	paid Aug. 15,	1900
J. M. Mossman, time locks	650 65,	paid April 25,	1900
J. M. Mossman, safe deposit locks	360 00,	paid April 23,	1902
J. M. Mossman, safe deposit locks	282 65,	paid April 23,	1902
J. M. Mossman, safe deposit boxes	2,937 95,	paid April 23,	1902
J. M. Mossman, safe deposit locks	104 40,	paid Mar. 18,	1902
J. M. Mossman, safe deposit locks	423 40,	paid May 20,	1903
J. M. Mossman, safe deposit locks	2,578 25,	paid Oct. 11,	1899
J. M. Mossman, safe deposit locks	358 50,	paid Aug. 17,	1904
R. Hildebrand, cabinet work	398 80,	paid Dec. 19,	1890
R. Hildebrand, cabinet work	480 50,	paid Dec. 19,	1890
R. Hildebrand, cabinet work	341 65,	paid Jan. 13,	1891
R. Hildebrand, cabinet work	652 42,	paid Mar. 9,	1891
R. Hildebrand, cabinet work	2,974 17,	paid Oct. 24,	1891
Chas. Wolff, pneumatic tubes	500 00,	paid Nov. 9,	1891
F. Graves, ventilating work	2,230 02,	paid Aug. 17,	1892
R. J. Clash, lining vault	670 00,	paid May 12,	1893
F. Beck & Co., decorating	3,320 00,	paid May 24,	1893
J. Williams, bronze sign	325 00,	paid Nov. 29,	1899
	$147,543 22		

E. & O. E., May 31, 1905.

Payments Made on Account of Alterations and Additions, Security Safe Deposit Company of Boston, Mass.

R. Hildebrand, cabinet work	$2,500 00,	paid April	6, 1891
R. Hildebrand, cabinet work	2,000 00,	paid May	12, 1891
R. Hildebrand, cabinet work	1,733 01,	paid July	8, 1891
J. M. Mossman, safe deposit boxes	1,012 20,	paid Jan.	9, 1891
J. M. Mossman, safe deposit boxes	3,618 00,	paid Mar.	21, 1900
Smith & Lovett, iron work	1,761 96,	paid Jan.	29, 1891
Smith & Lovett, iron work	2,113 17,	paid April	10, 1891
Smith & Lovett, gratings and steel door	350 00,	paid Sep.	21, 1891
Batterson & Eisle, marble work	2,500 00,	paid April	13, 1891
Batterson & Eisle, marble work	862 04,	paid July	9, 1891
Batterson & Eisle, marble work	3,033 00,	paid Oct.	31, 1894
G. H. Price, burglar alarm	1,250 00,	paid July	21, 1891
J. B. & J. M. Cornell, safe deposit boxes	4,800 00,	paid Feb.	12, 1892
J. B. & J. M. Cornell, new vault	50,000 00,	paid July	27, 1894
J. B. & J. M. Cornell, new vault	36,134 28,	paid Oct.	25, 1894
J. P. Cushing Co., burglar alarms	1,219 45,	paid July	14, 1892
J. P. Cushing Co., electrical work	981 89,	paid Jan.	7, 1893
Damon Safe and Iron Co., safe deposit boxes	4,541 00,	paid June	2, 1893
Damon Safe and Iron Co., safe deposit boxes	4,000 00,	paid Nov.	21, 1894
Damon Safe and Iron Co., safe deposit boxes	3,500 00,	paid Jan.	9, 1895
Cottier & Co., decorating	2,500 00,	paid Oct.	26, 1894
Cottier & Co., decorating	2,500 00,	paid Nov.	23, 1894
Cottier & Co., decorating	2,605 00,	paid Dec.	20, 1894
J. P. Perry, electrical supplies	1,046 26,	paid Jan.	22, 1895
Poulsen & Eger, tablet	365 00,	paid Jan.	23, 1895
Andrews, Jaques & R., commission	2,061 53,	paid Jan.	30, 1895
L. D. Willcutt & Son	15,999 62,	paid Jan.	30, 1895
J. B. Cashman, plans and details	1,000 00,	paid Jan.	8, 1895
Mosler Safe Co., vault doors and boxes	3,025 55,	paid Oct.	15, 1902
Mosler Safe Co., vault doors	1,815 00,	paid Aug.	19, 1903
Mosler Safe Co., safe deposit boxes	460 00,	paid May	16, 1904
Mosler Safe Co., vault front	738 00,	paid May	16, 1904
	$162,045 96		

E. & O. E.

Missouri Safe Deposit Company of St. Louis, Mo.

J. M. Mossman, safe deposit locks	$4,725 00,	paid Feb.	16, 1891
J. M. Mossman, locks and keys	627 55,	paid Aug.	12, 1897
J. M. Mossman, safe deposit boxes	1,100 00,	paid Dec.	1, 1898
J. M. Mossman, safe deposit boxes	1,687 45,	paid July	18, 1900
Thayer & Robinson, commission	561 75,	paid May	21, 1891
Herring & Co., safe deposit boxes	14,000 00,	paid May	7, 1891
St. Louis Stamping Co., safe boxes	2,080 00,	paid July	8, 1891
St. Louis Art Metal Co., metal cabinets	1,317 67,	paid July	27, 1899
Library Bureau, oak cabinet	83 00,	paid July	27, 1899
J. M. Mossman, safe deposit boxes	2,493 00,	paid Sep.	23, 1903
Alterations	4,655 98,	paid May	9, 1905
	$33,331 40		

E. & O. E., May 31, 1905.

COMMERCIAL TRUST COMPANY OF PHILADELPHIA.

The Commercial Trust Company of Philadelphia is advertised in a book published by The Equitable Society annually, as one of its affiliated companies. Many of its directors are Equitable people. Many years ago the custom or practice began of making advances by the Society to its agents. In about the year 1893 the total of these advances was large and appeared as an asset in the annual report of the Society, but was not admitted as an asset by the Insurance Department of the State of New York. It therefore occurred to Henry B. Hyde to get a financial institution which would answer a double purpose, and this Commercial Trust Company of Philadelphia was either organized or purchased. Since that time, annually, large sums of agents' advances have been assigned to this Trust Company. Credit has been given The Equitable Society in the Trust Company's books, as so much cash deposited, and has been admitted as an asset by the Insurance Department. The other purpose which it serves is to make a profit for the Trust Company, in which many Equitable officers and directors are interested as stockholders, and at the loss of The Equitable Society. On the twelfth day of December, 1904, The Equitable Society assigned to the Commercial Trust Company agents' balances to the amount of $4,273,249.45 by an assignment and agreement. This instrument, on its face, is an absolute assignment of all claims which go to make up the total, and contains the following covenants: "The said Society does hereby further, for the consideration aforesaid, warrant and guarantee to the said Commercial Trust Company that the several amounts advanced to the several individuals and copartnerships, as stated in said Schedule A, are justly due and owing to said Society from the said debtors named in Schedule A, together with interest thereon at the rate of five per cent per annum, and that said Society has a legal and valid claim against each and every of said debtors for the several amounts specified in said schedule, with interest thereon; that said advances arise upon contract or contracts between the said Society and the said debtors and consist of advances made by said Society upon the contract rights of said several debtors to commissions on the renewal premiums

on policies in said Society, and that such liens are duly evidenced by documents now in the possession of said Society. And the said Society further warrants and guarantees that the present value of said rights under said annual renewal commissions of said debtors, set forth in said schedule, computed at five times (or a lesser number of times, as indicated in the margin of said schedule), is equal to at least the amount of such advances as set forth in Schedule A."

On the same day, December 12, 1904, by an assignment and agreement of exactly the same form, The Equitable Society transferred to the the Equitable Trust Company of New York another schedule of agents' balances amounting to $1,539,935.42. Mr. Clarence L. Gillespie, Vice President of this Trust Company, was called as a witness and stated, in substance, that the assignment and agreement together with the schedule was the only paper delivered by the Society to the Trust Company. That none of the notes or other evidences of debt held by the Society against the agents were delivered with the assignment. That the Trust Company simply took this instrument and entered it on its books as a loan to The Equitable Society. The Equitable Society retains all the evidences of claims against the individual agents to whom advances are made, collects them all and pays them over to the trust companies. This practice has been in vogue with the Commercial Trust Company since about the year 1894, and the Trust companies never suffered any loss. In fact these trust companies run no risk, and they have no trouble or expense in connection with the same. They simply enter the total amounts in their books as loans to The Equitable Society, on which they get five per cent.; and the Commercial Trust Company pays The Equitable Society 3 per cent. on its deposits, and the Equitable Trust Company only pays 2 per cent. on its deposits. If The Equitable Society had not made these assignments its total assets would appear to be $5,813,184.87 less. If it had retained these accounts it would have saved in the transaction with the Commercial Trust Company, 2 per cent. on $4,273,249.45, or $85,464.98, and it would have saved in the transaction with the Equitable Trust Company, 3 per cent. on $1,539,935.42, or

$46,198.06. No reason appears why it should not have done so, for its bank cash deposits for a long time back have averaged between twenty and thirty millions of dollars. It is only fair to say, however, that The Equitable Society is a stockholder in the Commercial Trust Company in the sum of about $347,500, par value, and gets its share of the profits in the form of dividends. It is also a stockholder in the Equitable Trust Company in the sum of about $1,300,000, par value, and gets its share of the profits realized by that company from this transaction in the form of dividends; and it is only fair to say also, that James H. Hyde is an officer of the Commercial Trust Company at $2,500 a year and a stockholder in the sum of $25,000 par value, and he is also Vice President of the Equitable Trust Company at $12,000 a year and a stockholder in the sum of $300,000, par value. He therefore has a strong interest in seeing to it that these trust companies run no risk and reap good profits.

The Equitable Trust Company of New York.

An inquiry was made in relation to the organization of The Equitable Trust Company of New York, one of the affiliated companies of the Equitable Society. The name of the original corporation was "American Deposit and Loan Company," which was organized for the purpose of loaning money to policyholders on Equitable policies. On the 1st day of June, 1896, the stock list of this company according to the statement verified by Mr. Krech, President of the Equitable Trust Company, was as follows:

	Shares.
W. H. Coler, Jr.	10
W. T. Hatch	10
Marcellus Hartley	4,940
George W. Hebard	10
G. W. Jenkins	10
John E. Searles	10
George Westinghouse	10
	5,000

Marcellus Hartley was a personal friend of Henry B. Hyde, a director of the Society and a member of the Executive Committee. The 4,940 shares were supposedly put in his name for the purpose of distribution, and when that was accomplished the stockholders of record were as follows:

	Shares.
James W. Alexander	100
William Alexander	50
H. M. Alexander	10
C. B. Alexander	100
Alexander & Colby	180
Bainbridge Colby	10
W. N. Coler, Jr	25
T. DeWitt Cuyler	200
C. M. Depew	200
Equitable Life Assurance Society	2,335
Louis Fitzgerald	100
Marcellus Hartley	250
G. D. Hartley	100
J. H. Hyde	300
Annie F. Hyde	50
G. W. Jenkins	100
T. D. Jordan	100
S. S. McCurdy	5
W. H. McIntyre	100
Mercantile Trust Company	200
M. B. Metcalf	50
M. Murray	10
William R. Porter	25
S. D. Ripley	100
V. P. Snyder	50
George H. Squire	50
G. E. Tarbell	100
George T. Wilson	100
Total	5,000

The list of stockholders as of January 7, 1902, was the same as the foregoing. In order to get a clear understanding of this transaction it should be observed that nearly all of this stock appears in the name of the Equitable Society and its directors, especially the members of the Executive Committee. It was an affiliated or subsidiary company of the Equitable Society, and was made one of its depositories. On January 7, 1902, the increase of its capital stock from $500,000 to $1,000,000 was authorized. The book value of the stock at the time this increase was authorized was $150 per share. The terms of the increase were that it was to be paid for at the rate of $150 per share and each stockholder of record was entitled to subscribe for one additional share for each share of his holdings.

It should be noted that the Equitable Society, which was entitled to take 2,335 shares on this increase, elected to take only 665 shares, making its holdings 3,000 shares. The 1,670 shares allotted to the Equitable Society which it did not take were distributed as follows:

	Shares.
James H. Hyde	565
James H. Hyde and W. H. McIntyre, Trustees	702
Annie F. Hyde	75

And the balance, 328 shares, to other members of the Executive Committee of the Society.

The privilege of subscribing to this increase proved to be very valuable, which will appear when the plans which had been mapped out by Mr. Hyde and his friends for the further increase of capital were carried out. Mr. Hyde in his evidence explains, when asked why The Equitable Society did not exercise this privilege, that he as Chairman of the Executive and Finance Committees, and the other members of these committees thought it unwise for the Society to take in at $150 a share its full allotment of stock. Nevertheless, on his own personal account and for his mother and for himself, and W. H. McIntyre as Trustees, he was willing to assume the risk.

The next step taken was an act of the Legislature passed April 2, 1902, changing the name of the corporation to the

Equitable Trust Company of New York. On January 28, 1903, its capital stock was again increased from one to three millions, the additional increase to be paid for at $500 per share. The list of stockholders and their holdings on January 27, 1903, the day before the increase, and also the list as of January 28, 1903, immediately after the increase, is now set forth:

List of Stockholders of Date January 27, 1903.

	Shares.
Alexander, James W	350
Alexander, William	75
Alexander & Colby	280
Alexander, H. M	10
Alexander, C. B	150
Adams, 2d, C. F	10
Amendt, A. L	25
Baldwin, Jr., W. H	10
Bremner, W. B	10
Cornell, William T	100
Coler, W. N	75
Coggeshall, E. W	100
Colby, Bainbridge	10
Crocker, W. H	10
Cuyler, T. DeWitt	150
Deming, H. C	100
Depew, Chauncey M	300
Dowling, Robt. E	100
Dryden, John F	100
Equitable Life Assurance Society	2,605
Euvrard, Camille	5
Flake, Albert	100
Fitzgerald, Louis	350
Frick, Henry C	105
Gillespie, L. L	25
Hartley, Estate of M	375
Hartley, G. D	150
Harriman, E. H	200
Hall, J. M	10

List of Stockholders of Date January 27, 1903—(Continued).

	Shares.
Hebard, George W	50
Hubbard, T. H	100
Hyde, James H	1,117
Hyde, Annie F	175
Inman, S. M	10
Jenkins, Geo. W	150
Jessup, Morris K	150
Jordan, Thomas D	150
Johnson, Bradish	100
Kahn, Otto H	10
Kuhn, Loeb & Co	200
Mackay, Clarence H	10
Mercantile Trust Co	300
Metcalf, M. B	75
Middlebrook, F. J	10
Moffat, D. H	10
Murray, M	20
McCarter, U. H	50
McIntyre, W. H	200
McCurdy, S. S	8
Ochs, A. S	50
Pendreigh, F. M	10
Ripley, Sidney Dillon	235
Smith, J. Henry	100
Stone, Melville E	40
Squire, George H	200
Snyder, V. P	100
Tarbell, Gage E	200
Van Horne, Wm. C	10
Williamson, C. F	20
Winthrop, H. R	100
Wilson, Geo. F	150
	10,000

List of Stockholders as of January 28, 1903.

	Shares.
Alexander, James W	638
Alexander, William	93
Alexander & Colby	280
Alexander, H. M	235
Alexander, C. B	188
Adams, 2d, C. F	110
Amendt, A. L	32
Armour, J. C	100
Baldwin, Jr., W. H	110
Blanchard, T. C. E	20
Blanchard, Fred C	20
Bremner, W. B	20
Castles, J. W	50
Cornell, Wm. T	125
Coler, Jr., W. N	225
Coggeshall, E. W	125
Colby, Bainbridge	85
Crocker, W. H	110
Coudert, Jr., F. R	100
Cuyler, T. DeWitt	187
Deming, H. C	125
Depew, Chauncey M	375
Dowling, Robert E	200
Dryden, John F	250
Dryden, F. F	50
Equitable Life Assurance Society, The	13,168
Euvrard, Camille	10
Flake, Albert	200
Fitzgerald, Louis	350
Frick, Henry C	505
Forgan, J. B	100
Fulle, F. W	10
Gregory, Eliott	50
Gillespie, L. L	107

List of Stockholders as of January 28, 1903—(Continued).

	Shares.
Gould, George J.	500
Hartley, Estate of M.	469
Hartley, G. D.	188
Harriman, E. H.	500
Hall, J. M.	10
Hebard, George W.	63
Hubbard, T. H.	100
Hunter, R. R.	5
Hyde, James H.	3,000
Hyde, Annie F.	400
Inman, S. M.	20
Jenkins, George W.	188
Jessup, Morris K.	188
Jordan, Thomas D.	188
Johnson, Bradish	200
Johnson, Wilbur S.	20
Kahn, O. H.	10
Kanouse, E. D.	20
Krech, A. W.	50
Kuhn, Loeb & Co.	1,150
Kuser, A. R.	65
Mackay, Clarence H.	110
Mercantile Trust Company	375
Metcalf, M. B.	225
Merrick, Wm. A.	500
Moffat, D. H.	110
Middlebrook, F. J.	25
Murray, M.	35
McCarter, U. H.	63
McIntyre, W. H.	250
McCurdy, S. S.	10
McClusky, George W.	50
Ochs, A. S.	63
Pendreigh, F. M.	13

List of Stockholders as of January 28, 1903—(Continued).

	Shares.
Porter, Jr., H. H	100
Ripley, Sidney Dillon	294
Rhoades, Jr., L	5
Rouzer, Geo. W	10
Scheerer, William	25
Smith, J. Henry	125
Stone, Melville E	40
Squire, George H	600
Snyder, V. P	125
Tarbell, G. E	450
Tailer, T. S	50
Taylor, Jerome	20
Van Horne, Wm. C	10
Valentine, P. A	100
Walker, W. M	5
Ward, L. D	50
Ward, Edgar B	50
Williamson, C. F	25
Winthrop, H. R	200
Wilson, Geo. T	200
	30,000

It will be noted that the Equitable Society is now the owner of 13,168 shares, an increase of 10,563 shares over its holdings on the 27th day of January, 1903, paid for at $500 per share, an investment of $5,281,500. Mr. Krech, in his testimony, states that the book value of the Trust Company stock after this increase was paid in was $383 1-3 per share. In other words the stock that was paid for at $500 per share has now a book value of $383 1-3 per share, a loss to the Society of $116 2-3 per share, and the stockholders who took the stock at $150 had the book value of their stock increased to $383 1-3, a profit of $233 1-3 per share, a very handsome showing to the gentlemen who took the stock alloted to the Equitable Society, and the shareholders of January 27, 1903,

before the increase, and a very large loss to the Society by reason of the determination of the executive committee that it was unwise for the Equitable to take the stock allotted to it. Since this reorganization the Equitable Society has kept on deposit with the trust company an average of about $10,000,000 at the low rate of 2 per cent. per annum.

The simple statement of the above transaction directed by the officers of the Equitable Society and approved by their executive committee, demonstrates that they were not solicitous for the Society's welfare but active in promoting their own private interests.

NATIONAL BANK OF COMMERCE.

An inquiry was instituted into the consolidation of the Western National Bank of the City of New York with the National Bank of the United States of New York, under the name of the Western National Bank of the United States in New York. Mr. Snyder, president of the National Bank of Commerce, stated in his evidence that he was at that time, 1902, president of the Western National Bank of the City of New York; that it was a flourishing banking corporation; that The Equitable Society held from 11,000 to 13,000 shares of its stock—he could not state definitely, but probably about 12,000 shares; that its book value was 245, and its market value about 600, that is, 600 bid, 625 asked; that the stock was sought for; that he could have sold the controlling interest at $700 a share; that The Equitable Society owned the controlling interest. Mr. Bainbridge Colby, who is one of the attorneys for The Equitable Society, in his evidence furnished a copy of the circular issued to the stockholders of the Western National Bank of the City of New York December 12, 1902, which is as follows:

To the Stockholders of the Western National Bank of the City of New York:

The board of directors of this bank, by unanimous vote, has adopted resolutions, copies of which are enclosed herewith, and has authorized the calling of a special meeting of the stockholders to consider and vote thereon.

Under these resolutions it is proposed, with the approval of the shareholders, to effect a consolidation of this bank with The National Bank of the United States in New York under the name of The Western National Bank of the United States in New York, and with a capital of $10,000,000, and a surplus of $2,500,000.

To accomplish this result it is proposed to place this bank in voluntary liquidation, and to sell its assets to The National Bank of the United States in New York, which will increase its capital stock to $10,000,000, part of said increase to be used in the purchase of the assets of this bank.

The result will be a bank of the first magnitude, with a capital and surplus commensurate with the increased scale of present financial and mercantile transactions and supported by powerful interests capable of sustaining and extending its growth, viz., The Equitable Life Assurance Society, The Mutual Life Insurance Company, The Morton Trust Company, and various allied interests.

Accordingly, the principal stockholders of this bank have named Messrs. James W. Alexander, James H. Hyde and Valentine P. Snyder, as a committee to effectuate this plan, and said committee has requested your Board to inform you that said committee is authorized, in the event that the capital stock of The National Bank of the United States in New York, is increased, as above, to make the following alternative offers to the stockholders of this bank, namely:

(1) To deliver to each stockholder for every $100 par value of stock, $70 in cash and $140 at par in the stock of the Consolidated Bank; or

(2) To pay to every stockholder who does not elect to join in the consolidation, for each $100 in stock of this bank, $600 in cash.

This offer is conditioned, of course, upon its acceptance on or prior to January 6, 1903.

A majority of the shareholders of this bank, as well as a majority of the shareholders of the National Bank of the United States, have signified their approval of the above plan, and its

acceptance is recommended as highly advantageous to every shareholder by the respective boards of directors.

You are, therefore, requested to deposit your stock, endorsed in blank, with The Equitable Trust Company of New York, No. 25 Nassau street, in the City of New York, on or before January 6, 1903, in exchange for a negotiable receipt entitling you, upon the consummation of the above plan, to either cash, or cash and stock, as you may have elected.

You are also requested to sign and return in the enclosed envelope the accompanying form of proxy, signed in the presence of a witness, to vote your stock in favor of the foregoing plan.

New York City, December 12, 1902.

JAMES W. ALEXANDER,
H. M. ALEXANDER,
CHARLES T. BARNEY,
C. LEDYARD BLAIR,
J. M. CEBALLOS,
WILLIAM N. COLER, JR.,
CHAUNCEY M. DEPEW,
JOHN F. DRYDEN,
MARTIN ERDMANN,
LOUIS FITZGERALD,
VALENTINE P. SNYDER,
GEORGE J. GOULD,
THOMAS H. HUBBARD,
JAMES H. HYDE,
BRAYTON IVES,
OTTO H. KAHN,
LUTHER KOUNTZE,
JOHN HOWARD LATHAM,
DAVID H. MOFFAT,
SIDNEY F. TYLER,
J. H. PARKER,

Board of Directors.

Resolutions of Directors.

WHEREAS, it is proposed by the holders of a majority in amount of the shares of the capital stock of The Western National Bank of the City of New York, and of the National Bank of the United States in New York, that the said banks be consolidated by the purchase by The National Bank of the United States of all the assets of this bank at the book value thereof, as shown by this bank's statement of its assets and liabilities on the date of such sale, and the assumption by The National Bank of the United States of the liabilities of this bank, of the date of such sale, as shown by such statement;

RESOLVED, that in the opinion of this board it is desirable, and for the best interests of the shareholders of this bank, that such proposed consolidation be made, and accordingly that this bank be placed in voluntary liquidation, under the provisions of sections 5220 and 5221 of the United States Revised Statutes, such liquidation to take effect on the 31st day of January, 1903;

RESOLVED, FURTHER, that a special meeting of the stockholders of this bank be and is hereby called, to be held at its banking house, 15 Nassau street, New York city, on the 13th day of January, 1903, for the purpose of voting on the following propositions:

To place this Bank in voluntary liquidation, under the provisions of sections 5220 and 5221 of the United States Revised Statutes, such liquidation to take effect on the 31st day of January, 1903; and to authorize and approve the sale of all the assets of this Bank at the book value thereof, as shown by the Bank's statements of its assets and liabilities of the date of such sale, and the assumption by The National Bank of the United States of all the liabilities of this Bank, as shown by such statement;

RESOLVED, FURTHER, that thirty days' notice of the proposed meeting be given to each shareholder of record, by publication in at least one newspaper published in the City of New York.

RESOLVED, FURTHER, that Wm. A. Wheelock, Thomas D. Jordan and Bainbridge Colby (neither of whom is a director or officer or employee of this Bank), be and they are hereby authorized to

request each stockholder to constitute them and either of them as proxy, agent and attorney, to vote and act at said meeting of the stockholders upon the foregoing propositions, and that a proxy be enclosed with the notice of the meeting, to be mailed to each stockholder, in the form submitted to and approved by this meeting.

RESOLVED, FURTHER, that the transfer books of the shares in the capital stock of this Bank be closed at 3 o'clock p. m on the 6th day of January, 1903, and remain closed until 10 o'clock a. m. on the 15th day of January, 1903.

It appears from this circular that the Board of Directors of The Equitable Society accepted the conditions for this merger, which in substance were to deliver to each stockholder for every $100, par value, of stock, $70 in cash and $140 at par in the consolidated bank, or to pay to each stockholder who did not come into the consolidation for each $100 in stock, $600 in cash. The Equitable Society, through its Executive Committee, voted to accept the offer of $70 in cash and $140 in the stock of the consolidated bank. The Western National Bank of the United States was afterwards merged into the National Bank of Commerce.

It also appears from this statement that what the Society really received for its stock in the Western National Bank of New York was $210 per share, and it would have been much more profitable to the Society to have disposed of its holdings at the offered $600 per share, or better still to have sold its controlling interests for $700 a share, and it appears further that in the merger, the book value of the stock of the Western National Bank of New York being $245 per share, it received $35 a share on its 12,000 shares or holdings less than the book value, which Mr. Snyder stated was a correct statement. Mr. Snyder was asked what The Equitable Society really gained by the merger, and he answered "Nothing but promises and prospects," which I conclude did not materialize, as he afterwards stated that the present book value of the National Bank of Commerce stock was between 145 and 150. The merger and the

organization of this great bank seems to have been effected to gratify the ambition of the officers of The Equitable Society, without regard to the financial interests of the Society and its policyholders.

This is a brief statement of a few of the transactions between The Equitable Society and seven of the ten corporations which are advertised as affiliated companies. Time has not permitted even a partial investigation of its business relations with the other three, viz.: The Lawyers' Title Insurance Company, the Lawyers' Mortgage Insurance, and the Franklin National Bank. But the facts here stated disclose a very decided tendency on the part of some of the directors and officers of the Society to sacrifice its interests in order that they may reap the profits through the media of these corporations. The opportunity was there as well as the disposition, and it would require a much more thorough investigation than I have been able to make to determine the full amount of the loss that the Society has suffered at their hands.

Syndicate Transactions.

The syndicate transactions conducted by "James H. Hyde and Associates," have been so well advertised through the press that they have become notorious. According to the evidence of William H. McIntyre, the letters of Kuhn, Loeb & Company to Mr. Hyde and Mr. Hyde's correspondence, copies of which he submitted to us, the following are the material facts relative to these transactions:

Metropolitan Street Railway Four Per Cent Bonds of 2002, Syndicate.

On June 11, 1902, Kuhn, Loeb & Co., allotted to James H. Hyde and Associates a participation in this syndicate of $1,000,000, at 94 and interest. June 18, 1902, the Executive Committee of The Equitable Society recommended the purchase of $1,000,000 of these bonds at 97½ and interest. June 20, 1902, the purchase of these

bonds was reported to the Executive Committee at 97½ and interest, less ½ per cent, and on July 8, 1902, the bonds were delivered to the Society by Kuhn, Loeb & Company. From this transaction James H. Hyde and Associates realized profits of $30,210.38, which were divided according to the following sub-allotment:

	Allotment.	Profit.
Equitable Trust Company	$100,000	$3,021 03
Western National Bank	100,000	3,021 03
Commercial Trust Company, Philadelphia	100,000	3,021 03
Franklin National Bank, Philadelphia	100,000	3,021 03
V. P. Snyder	50,000	1,510 52
H. C. Deming	50,000	1,510 52
G. H. Squire	100,000	3,021 03
James W. Alexander	150,000	4,531 58
James H. Hyde	150,000	4,531 58
W. H. McIntyre	100,000	3,021 03
		$30,210 38

PHILADELPHIA, BALTIMORE AND WASHINGTON 4 PER CENT BONDS AND LONG ISLAND RAILROAD 4 PER CENT BONDS SYNDICATE.

On October 28, 1903, Kuhn, Loeb & Co. allotted to James H. Hyde and Associates a participation in this syndicate of $600,000. On October 30, 1903, the matter of buying some of these bonds was referred to the President and Vice-President with power. On November 18, 1903, the committee recommended the purchase of $1,000,000 of the Philadelphia, Baltimore & Washington bonds from Kuhn, Loeb & Co., at 104 and interest, and on November 20, 1903, the purchase of $1,000,000 of these bonds at 104 and interest was reported. By the purchase of $1,000,000 of the Long Island Railroad refunding bonds the cost of the former bonds was reduced to 102¼.

From this transaction James H. Hyde and Associates realized a profit of $11,930.55, which was divided according to the following sub-allotment:

	Allotment.	Profit.
James W. Alexander.....	$150,000	$2,982 64
James H. Hyde.....	150,000	2,982 64
George H. Squire.....	150,000	2,982 64
W. H. McIntyre.....	150,000	2,982 63
		$11,930 55

OREGON SHORT LINE REFUNDING MORTGAGE 4 PER CENT 25-YEAR GOLD BONDS SYNDICATE.

On October 28, 1904, Kuhn, Loeb & Co. allotted to James H. Hyde and Associates a participation in this syndicate of $1,250,000, at 96 and accrued interest. On November 2, 1904, the Executive Committee of The Equitable Society recommended the purchase of $1,000,000 of these bonds at 97 and interest, and soon thereafter $1,250,000 were purchased from Kuhn, Loeb & Co. at 97 by the Society. Mr. McIntyre explains that the syndicate made some profit in the way of commissions on the sales.

From this transaction James H. Hyde and Associates realized a profit of $25,047.46, which was divided according to the following sub-allotment:

	Allotment.	Profit.
James W. Alexander.....	$625,000	$12,523 73
James H. Hyde.....	625,000	12,523 73
		$25,047 46

P., C., C. & ST. LOUIS RAILWAY CONSOLIDATED MORTGAGE FOUR PER CENT. GOLD BONDS SYNDICATE.

On September 26, 1904, Speyer & Company and Kuhn, Loeb & Company allotted to James H. Hyde and Associates a partici-

pation in this syndicate of $500,000 at par and interest. On October 14, 1904, the Equitable Society bought from Kuhn, Loeb & Company $1,000,000 of these bonds at 103.

From this transaction James H. Hyde and Associates realized a profit of $10,261.46, which was divided as follows:

	Allotment.	Profit.
James W. Alexander	$250,000	$5,130 73
James H. Hyde	250,000	5,130 73
		$10,261 46

NORFOLK AND WESTERN DIVISIONAL FIRST LIEN AND GENERAL MORTGAGE FOUR PER CENT. BONDS SYNDICATE.

On October 14, 1904, Brown Brothers & Co. allotted to James H. Hyde and Associates a participation of $250,000 in this syndicate at 94½ and interest. On October 17, 1904, the Executive Committee of the Equitable Society recommended the purchase of $250,000 of these bonds at 96½ and interest, less ¼ per cent. commission.

From this transaction James H. Hyde and Associates realized a profit of $3,758, which was divided as follows:

	Allotment.	Profit.
James W. Alexander	$125,000	$1,879 00
James H. Hyde	125,000	1,879 00
		$3,758 00

IMPERIAL JAPANESE GOVERMENT SIX PER CENT. STERLING LOAN GUARANTEED SYNDICATE.

First Syndicate.

May 6, 1904, Kuhn, Loeb & Company allotted to James H. Hyde and Associates a participation in this syndicate of 400,000 pounds, or about $2,000,000 par value. On the same day the Executive Committee of the Equitable Society left the matter of subscrib-

ing for these bonds to Messrs. Alexander and Squire with power. Within a reasonable time thereafter (the exact date does not appear) the Society bought substantially the same amount of these bonds from Kuhn, Loeb & Company.

From this transaction James H. Hyde and Associates made a total profit of $25,635.41, which was divided according to the following sub-allotment:

	Allotment.	Profit.
Equitable Life Society	$750,000	$9,613 26
James W. Alexander	250,000	3,204 43
James H. Hyde	250,000	3,204 43
George H. Squire	250,000	3,204 43
W. H. McIntyre	250,000	3,204 43
H. C. Deming	125,000	1,602 22
A. W. Krech	125,000	1,602 21
		$25,635 41

Second Syndicate.

As a part of the same transaction Kuhn, Loeb & Company allotted to James H. Hyde and Associates a participation in a second syndicate of these Japanese bonds of $1,200,000.

By this transaction James H. Hyde and Associates realized a profit of $23,424, which was divided according to the following sub-allotment:

	Allotment.	Profit.
Equitable Life	$450,000	$8,784 00
J. W. Alexander	150,000	2,928 00
James H. Hyde	150,000	2,928 00
George H. Squire	150,000	2,928 00
William H. McIntyre	150,000	2,928 00
H. C. Deming	75,000	1,464 00
A. W. Krech	75,000	1,464 00
		$23,424 00

IMPERIAL JAPANESE GOVERNMENT SIX PER CENT. STERLING LOAN (SECOND SERIES) SYNDICATE.

On November 3, 1904, Kuhn, Loeb & Company allotted to James H. Hyde and Associates a participation in this syndicate of 400,000 pounds, or about $2,000,000 par value. On December 5, 1904, the Equitable Society purchased $1,600,000, par value of these bonds at 88. It does not appear at what price the syndicate got them, but by this transaction James H. Hyde and Associates realized a total profit of $62,815.13, which was divided according to the sub-allotment as follows:

	Allotment.	Profit.
James W. Alexander	$180,000	$28,266 81
James H. Hyde	180,000	28,266 81
Mercantile Trust Company	20,000	3,140 75
Equitable Trust Company	20,000	3,140 76
		$62,815 13

ATCHISON, TOPEKA & SANTA FE FOUR PER CENT SERIAL DEBENTURE BONDS SYNDICATE.

On January 10, 1902, J. P. Morgan & Co. allotted to James H. Hyde and Associates a participation in this syndicate of $500,000 at 94½ and accrued interest.

On January 13, 1902, the matter of buying these bonds was brought up for consideration before the Executive Committee of the Society, and on or about January 15, 1902, the purchase of $1,000,000 of these bonds at prices ranging from 97 to 98½ was reported.

By this transaction James H. Hyde and Associates realized a profit of $11,422, which was divided according to the following sub-allotment:

	Allotment.	Profit.
James W. Alexander	$100,000	$2,284 40
James H. Hyde	100,000	2,284 40

	Allotment.	Profit.
George H. Squire	$100,000	$2,284 40
Louis Fitzgerald	100,000	2,284 40
W. H. McIntyre	100,000	2,284 40
		$11,422 00

By simple addition it appears that the gentlemen and corporations associated in these transactions made the following profits:

James H. Hyde	$63,731 32
James W. Alexander	63,731 32
George H. Squire	14,420 50
William H. McIntyre	14,420 50
H. C. Deming	4,576 74
Valentine P. Snyder	1,510 52
Alvin W. Krech	3,066 21
Louis Fitzgerald	2,284 40
The Equitable Trust Co	6,161 79
The Western National Bank	3,021 03
The Commercial Trust Co. of Philadelphia	3,021 03
Franklin National Bank	3,021 03
Mercantile Trust Co	3,140 75
Total	$186,107 14

The corporations mentioned were taken in and given a small participation because they were "affiliated" with the Equitable Society, and the other associates were interested in their dividends. All of these gentlemen who divided these profits were directors of the Society and six of them members of the executive and finance committees. As syndicators they took these several allotments of securities and as directors of the Society they caused it to purchase of Kuhn, Loeb & Company substantially the same amounts which were allotted to them. To illustrate from the first transaction above set forth: On June 11, 1902, Kuhn, Loeb & Company allotted to James H. Hyde and associates a participa-

tion of $1,000,000 in the Metropolitan Street Railway four per cent. bond syndicate at 94, and one week thereafter the Equitable Society bought the same amount at about 97. This participation was allotted to these men because it was known they could dispose of them, and when they accepted the participation they knew where they could sell them. Why should the officers of the Society make this three per cent. profit? Why not allow the Society itself this participation and save this $30,000, since it was the intention that it should buy the bonds and take the risk? That was not contrary to its rules, for it was given a small participation in some of these syndicates. The simple truth is that they preferred to make these several profits themselves.

Mr. Hyde and associates raise the point that the Society did not lose by the purchase of these bonds, but that is no excuse for them. If the market went down the Society would have lost and if it went up the Society should get the profit. They were trustees. Their first obligation was to the trust estate which they represented. They should not be permitted to make money for themselves at the loss or even at the risk of the Society. The profits which they and each of them realized belong to the Society. Mr. Hyde and Mr. Alexander seem to have thought so, or were so advised by their counsel after the trouble began, for one of these gentlemen turned over to M. Murray as Trustee all, and the other a large part, of his profits from these transactions. All these men should be compelled to pay back to the Society these several amounts with interest. This is only very mild punishment. And the affiliated companies should also pay to the Society the several amounts received by them less any portions thereof which the Society has received in the form of dividends.

This question was put to Mr. Alexander on the witness stand: "Were you in the syndicate?" And he answered: "Mr. Hyde managed these matters on his own voluntary part and put me down for a share. When the matter came complete I turned what I made over to the cashier. Whether there is any legal question about it or not, it seemed to me a questionable thing for

an officer to participate in a syndicate that was making money by selling bonds concurrently to the company." He further explains that he did not know at the time that The Equitable Society was buying any portion of the bonds or securities in which James H. Hyde and Associates were allotted participation, and he claims he was conscious of no wrong or a violation of his duty as an officer of the Society. Mr. Hyde insists that Mr. Alexander was aware of the transactions which were being made and knew from what source the profits came. He put in evidence photographs of eight checks drawn by himself to Mr. Alexander in payment of Mr. Alexander's profits in these eight transactions, and he produced a letter and states other facts by which he claims that Mr. Alexander was not in ignorance as to the character of the business being done. He does not plead ignorance of the facts on his own part, but insists that they were entirely legitimate and proper business transactions. Mr. McIntyre, who was a very candid and exact witness, stated all the facts fully and completely. He has not returned to M. Murray, Trustee, or to anybody else, any part of his profit, but makes the argument that since he was not at that time a member of the Executive or Finance Committees he is entirely blameless, and that his part in the transaction was entirely honorable and legitimate. His comprehension as to the duties of a director toward his trust estate is not surprising, for he was reared in the Society since the age of fourteen, and under the immediate tutelage of the late Henry B. Hyde.

Other Stock Transactions.

The schedules prepared and verified by the Financial Secretary of the Society of the purchases and sales of the stock of the Mercantile Trust Company and of the Equitable Trust Company disclose some peculiar and unusual business transactions. During the years 1903 and 1904 it appears from this schedule that the Equitable Society was a frequent purchaser of the stock of the Equitable Trust Company at from $640 to $750 a share, and dur-

ing the same period of time it was disposing of these securities to various individuals at about $500 a share. In the schedule furnished of the stock transactions of the Mercantile Trust Company it appears that as early as 1900 the Equitable Society was a purchaser of the stock of that company at $800 a share and during the years 1904 and 1905 it has been a frequent purchaser of the stock of that company at about $1,000 a share. In the record of sales in 1900, on January 4th is a sale of 100 shares to George J. Gould at $500 a share, and upon the same day 50 shares to Mr. Frick at $850 a share, and on December 20, 1901, 100 shares to M. L. Schiff at $900 a share and on January 3, 1902—fourteen days later—100 shares to E. H. Harriman at $500 a share. These purchases and sales, it appears from the record, were nearly all approved by the finance committee of the Society.

There is one other transaction covering the sale of securities which I call attention to. On November 18, 1904, the Equitable Society re-sold to Kuhn, Loeb & Company $1,123,308, par value, of the first issue of Japanese bonds at 91⅞ flat. With the interest which had accrued on them at that time it was practically 91 net. These bonds were purchased from Kuhn, Loeb & Company May 25th and June 30, 1904, at 93½ and interest, a loss in the sale to the Equitable Society of 2½ per cent., amounting in the aggregate to $28,082.70. If they had been held they could have been sold at a very much higher figure. When the inquiry was made of Mr. Schiff in his evidence as to the reason for this sale of bonds, he stated that possibly the Society was preparing to purchase the second issue of Japanese bonds, which I find was correct, for on December 5, 1904, the Equitable Society purchased $1,600,000 par value of the second issue of Japanese bonds, and the total profit realized by James H. Hyde and Associates in this transaction was $62,815.13, not a very advantageous transaction for the Equitable Society but a very profitable one to the James H. Hyde and Associates syndicate.

Mr. Schiff in his evidence was also referred to the matter of the sale on December 25, 1904, to the Equitable Society of $1,000,000 of the Missouri Pacific Gold Fours of 1945 at 94 and

interest by Kuhn, Loeb & Company. He was asked if those were not collateral bonds secured by the stock of the Iron Mountain Railroad and if he thought a collateral bond of that character was a fit investment for a life insurance company. He replied that he thought that ought to be said to the members of the Executive Committee who decided upon the purchase. He stated though that he was perfectly willing to risk his reputation as favoring the purchase, and stated that Kuhn, Loeb & Co. would be willing to take the bonds back at their cost at any time within a week. Later, on my advice, the Executive Committee of the Equitable Society re-sold the bonds to Kuhn, Loeb & Company.

An inquiry was also made of Mr. Schiff in reference to the sale to the Equitable Society of $1,000,000 of the Metropolitan Street Railroad Fours of 2002 at 97½ and interest, less ½ per cent., and he was asked if they were an underlying bond of the Metropolitan system, and he said, No, they were a refunding bond. He was asked if he thought that a refunding bond of a traction company was such a bond as a life insurance company could safely invest in. His reply was that he was very much mistaken if not all life companies had them. An inquiry was then made as to what the present worth of those bonds was and the answer was he believed about 91. The facts are that within the last ten days a reputable firm has offered for sale a large block of these bonds at 89 and interest.

These transactions are referred to simply to show the manner in which the Executive officers have conducted the business of the Society.

Salaries.

An examination of the Society's salary lists convinces me that the ordinary clerks and employees are not overpaid. So far as I have been able to learn or observe they are faithful and competent and earn their money. The extravagance and waste in the form of personal compensation appear in the salary list of the high executive officers and their immediate and favored assistants.

The following schedule shows the salaries of the executive officers since 1900:

Executive Department.

NAME.	1900.	1901.	1902.	1903.	1904.	1905.
James W. Alexander, Pres....	$75,000	$75,000	$75,000	$100,000	$100,000	$100,000
J. H. Hyde, Vice-Pres.....	30,000	30,000	75,000	100,000	100,000	100,000
		Aug. 1.				
G. E. Tarbell, 2d Vice-Pres...	50,000	60,000	60,000	60,000	60,000	60,000
G. T. Wilson, 3d Vice-Pres...	25,000	25,000	30,000	30,000	30,000	30,000
W. H. McIntyre, 4th Vice-Pres.	10,000	12,000	20,000	25,000	25,000	30,000
W. Alexander, Secretary.....	25,000	25,000	25,000	25,000	25,000	25,000
H. R. Winthrop, Asst. Sec....	.....	.....	2,500	3,000	3,000	6,000
J. G. Van Cise, Actuary.....	17,500	17,500	17,500	17,500	17,500	17,500
T. D. Jordan, Comptroller....	25,000	30,000	30,000	30,000	30,000	35,000
S. D. Ripley, Treas.....	18,000	18,000	18,000	18,000	18,000	18,000
W. D. Bremner, Asst. Treas..	.....	.....	.....	.....	3,600	4,800
					July 1.	
F. W. Jackson, Auditor.....	10,000	10,000	10,000	10,000	12,500	12,500
		Oct. 25.			May 1.	
S. C. Bolling, Supt. of Agencies	.....	15,000	15,000	15,000	18,000	18,000
J. B. Loring, Registrar.....	3,500	3,500	3,500	3,500	3,500	3,500
E. W. Lambert, Med. Dir....	25,000	25,000	25,000	25,000	25,000	25,000
Edward Curtis, Med. Dir....	15,000	15,000	15,000	15,000	15,000	15,000
W. R. Bross, Med. Dir.....	.....	.....	.....	.....	12,000	12,000
Arthur Pell, Med. Dir.....	.....	.....	.....	.....	10,000	10,000
M. Murray, Cashier.....	10,000	10,000	10,000	12,000	12,000	15,000
R. G. Hann, Asst. Actuary...	7,500	7,500	7,500	7,500	7,500	7,500
				Sept. 18.	June 1.	
Robert Henderson, Asst. Act..	.....	.....	.....	3,200	5,000	5,000
S. S. McCurdy, Asst. Regis'r..	.....	3,000	3,600	3,600	4,000	4,200
A. W. Maine, Asso. Auditor..	10,000	10,000	10,000	12,000	12,000	12,000
		March 22.				
H. R. Coursen, Asst. Auditor.	.....	7,500	7,500	7,500	10,000	10,000
W. P. Halsted, Collector.....	6,000	6,000	6,000	3,600	3,600	3,600
W. E. Johnson, Mort. Regis'r.	.....	.....	7,500	10,000	10,000	10,000
Samuel Frost, Recorder.....	2,600	2,800	4,000	4,000	4,000	4,000
Geo. H. Squire, Fin. Man....	15,000	15,000	15,000	20,000	20,000	20,000

The following schedule shows the total amounts paid for salaries to executive officers during said period:

1900	$380,100
1901	422,300
1902	491,100
1903	558,600
1904	613,600

These figures show an increase in salaries of executive officers of the Society in 1904 over 1900 of 61.43 per cent.

Mr. Hyde was advanced in salary the most rapidly. He graduated from college in 1898 at the age of twenty-two. In 1900 he drew a salary of $30,000, also in 1901; in 1902 his salary was advanced to $75,000, and in 1903, at the age of twenty-seven, it was jumped to an even $100,000.

The salaries of the president and vice-president were fixed by the Executive Committee. In this case the matter of these salaries was referred to a sub-committee composed of Hon. Chauncey M. Depew and Valentine P. Snyder. The following is a copy of the recommendation of this sub-committee:

"THE EQUITABLE ASSURANCE SOCIETY OF THE UNITED STATES,

120 BROADWAY, NEW YORK, *December* 22, 1902.

VICE-PRESIDENT'S OFFICE.

The undersigned, a committee appointed by the Executive Committee, for the purpose of acting upon the salaries of the officers of the company, have made a careful examination of the subject and decide, that in view of the greatly increased labor and responsibility upon the executive officers, that the salaries of the President and Vice-President be increased $25,000 per annum from and after January 1, 1905.

CHAUNCEY M. DEPEW,
V. P. SNYDER."

Mr. Snyder says all he remembers of the transaction is that one day when the members of the Executive Committee were at lunch in the Society's dining-room Senator Depew placed a paper before him and asked him to sign it, and he did, and that he thought it recommended the increase of Mr. Hyde's salary only. The evidence shows that President Alexander did not ask for an increase, but that Mr. Hyde did, and in order that his salary might be raised the advance in the president's salary was made necessary. It should be borne in mind that in addition to this salary which Mr. Hyde has been drawing from the Equitable Society he has been drawing a salary of $12,000 from the

Equitable Trust Company, $2,500 from the Commercial Trust Company of Philadelphia, $12,500 from the Mercantile Trust Company, and $1,000 from the Mercantile Safe Deposit Company; all told $128,000 a year, although he has spent several months in each year in Europe.

In passing it may not be inappropriate to mention a little matter of directors' and committes' fees. Mr. McIntyre says he is a director in thirteen corporations. A director in the Equitable Society who is on the Executive Committee receives $25 for each meeting, of which there are three each week, amounting to $3,900 a year. He is on other committees, which all told make his fees from the Society $4,480. His committee fees from six of the Society's affiliated companies (three of them in the Equitable Building, and all in New York City), amount to $3,960, making a total of $8,440 from the Society and its affiliated companies. The ordinary policyholder, I imagine, would consider this a pretty fair income.

Mr. Hyde is a director in about fifty corporations and if he attends to his duties as well as he represents, his committee and director fees would amount to many thousands of dollars per annum.

The Society has disbursed the following totals in fees to directors and members of committees:

1900	$32,670 00
1901	35,390 00
1902	38,805 00
1903	43,805 00
1904	44,995 00
1905 (to date)	11,200 00

Mr. Hyde prepared a verified statement of his directorships in different corporations, with the dates of his elections. It appears from this paper that he is a member of the Boards of a number of the great railroad corporations of the country, in the most of which he states he is not a stockholder. Mr. Hyde

is not an expert in railroad matters, having had no training in that direction, has had no wide experience and has never demonstrated his ability as a business man, and consequently I conclude that the great railroad managers did not put him on the directorate of their companies for either of these reasons, and the inference is that he has been put on these Boards for the reason that he was the financial head of a great insurance corporation whose assets were so large and whose ready money was always available for the purchase of securities which these great corporations are largely in the market to sell.

Expenses of Officers.

Mr. Hyde's expense account appears as follows: 1900, $7,176.82; 1901, $6,971.89; 1902, $2,588.24; 1903, $20,517.09; 1904, $15,285.70. These are several times larger than those of any other officer. He did not submit any itemized statements. These lump sums were paid on his vouchers. That seems to have been his practice for when he gave the celebrated Cambon dinner he drew from the Society's treasury $12,800 to pay the bill with no other authority than his own.

Pension.

An examination of the Society's pension list discloses the fact that Mrs. Hyde, mother of the Vice-President, has been drawing a pension of $25,000 a year since 1900. If Mr. Henry B. Hyde, who certainly worked hard to build up the Society, had died poor or comparatively poor, possibly no objection should be raised to this pension. But it is generally understood that he left a large estate, and his son, James H. Hyde, from the evidence produced in this inquiry, has large holdings of valuable stocks and other securities. It does not appear clearly by whom this pension was authorized, nor is any reason given why it should be allowed. I doubt very much if the officers of the Society have any legal right to give away to Mrs. Hyde this money, which rightfully belongs to the policyholders.

The following is a schedule of the fees paid attorneys in New York by the Society during the past five years:

	1900.	1901.	1902.	1903.	1904.	1905.
Alexander & Green	$27,200	$27,200	$15,200	$15,200	$43,200	$43,200
Alexander & Colby	15,000	15,000	24,000	24,000	24,000	24,000
Chauncey M. Depew	20,000	20,000	20,000	20,000	20,000	20,000
C. B. Alexander	.....	.....	12,000	12,000	.....	.....
D. B. Hill	7,500	5,000	5,000	5,000	5,000	5,000
Elihu Root	.....	.....	.....	.....	10,000	25,000

Several smaller fees have been paid during these years which are not on this schedule.

The following is a schedule of fees paid to attorneys outside of the State of New York during the last five years:

1900	$47,666 50
1901	60,257 02
1902	31,121 32
1903	62,652 53
1904	30,965 11

The bills for services of the attorneys who were retained by the President of the Equitable Society, in the matter in relation to the amended charter and the litigation which followed it, have not yet been presented, but will be a charge upon the Society.

Why were these officers during a long series of years permitted again and again to violate their obligations, and perpetrate so many wrongs against the interests of the Society for their own profit? A little consideration of the organization of the company and its methods of doing business will explain. Henry H. Hyde was an able, far-seeing insurance man. The fifty-two directors whom he selected in the first instance were respectable men of prominence in their several communities. This larger number was not necessary for the transaction of business, but they were useful to give the young society tone and character. The same class of men was continued as directors until the present time, and a little analysis of their personnel and interests may not be inappropriate.

The following thirty-six directors were a few months ago qualified by Hyde stock, viz.: Louis Fitzgerald, William A. Wheelock, H. C. Deming, Cornelius N. Bliss, George H. Squire, Charles S. Smith, V. P. Snyder, C. Ledyard Blair, Brayton Ives, M. E. Ingalls, A. J. Cassatt, E. H. Harriman, Jacob H. Schiff, James J. Hill, T. Jefferson Coolidge, John Jacob Astor, Sir William Van Horne, Gage E. Tarbell, Marvin Hughitt, Henry C. Frick, M. Hartley Dodge, John A. Stewart, Alfred G. Vanderbilt, Levi P. Morton, D. O. Mills, Robert T. Lincoln, George J. Gould, John Sloane, George T. Wilson, Thomas T. Eckert, William H. McIntyre, Samuel M. Inman, H. C. Haarstick, David H. Moffatt, Joseph T. Low, August Belmont. '

The following four directors were qualified by Alexander and Jordan stock, viz: James B. Forgan, H. Rogers Winthrop, Bradish Johnson, and Alvin W. Krech.

To qualify a director Mr. Hyde assigned him five shares of stock and immediately took a re-assignment in blank and an order that the dividends on that stock be paid to Mr. Hyde. In the stock book those five shares appear in the name of the director. In the dividend order book an order is entered that the dividends be paid to Mr. Hyde. The director, therefore, has no beneficial interest in the stock which appears in his name. The charter provides that each director "shall be a proprietor of at least five shares of said capital stock." The legal question presented here is for the lawyers and courts to decide, but in my judgment this is not the kind of qualification contemplated in the charter.

The ten directors who actually owned stock in their own right were as follows:

James W. Alexander, James H. Hyde, Chauncey M. Depew, Thomas D. Jordan, Charles B. Alexander, T. DeWitt Cuyler, H. M. Alexander, J. F. DeNavarro, William Alexander, John J. McCook.

There were two vacancies.

The Executive Commitee for the years 1903 and 1904 were, James H. Hyde, Chairman, James W. Alexander, William A.

Wheelock, Chauncey M. Depew, Valentine P. Snyder, H. C. Deming, Thomas D. Jordan, and George H. Squire.

Of these, Mr. Alexander was drawing a salary of $100,000 per annum; Mr. Depew a salary of $20,000 per annum; Mr. Jordan a salary of $30,000 per annum; Mr. Squire a salary of $15,000 per annum; Mr. Snyder was President of the National Bank of Commerce, an affiliated company.

Mr. Deming was President of the Mercantile Trust Company of which the Society own the stock control. Therefore, all of these associate members except possibly Mr. Snyder were absolutely dependent upon the Chairman, Mr. Hyde, for their salaries, for he dominated the Society by reason of his stock control. Mr. Wheelock was one of Mr. Hyde's qualified directors.

He is an elderly gentleman about 87 years of age, and is now paralyzed and unable to do any work or business. On February 16, 1905, after the internal dissentions had arisen, the Board of Directors undertook to infuse some new blood into this committee and made it up as follows: James H. Hyde, Chairman; James W. Alexander, Gage E. Tarbell, George T. Wilson, William H. McIntyre, Thomas D. Jordan, W. A. Wheelock, C. M. Depew, V. P. Snyder, H. C. Deming, A. W. Krech, H. C. Frick. The new men on the committee are Gage E. Tarbell, Second Vice-President and dependent on Mr. Hyde for his position; George T. Wilson, Third Vice-President and dependent on Mr. Hyde for his position; W. H. McIntyre, Fourth Vice-President and dependent on Mr. Hyde for his position; A. W. Krech, President of The Equitable Trust Company and dependent on Mr. Hyde for his position, for Mr. Hyde and The Equitable Society own a majority of its stock. Mr. H. C. Frick is the only man who on the record is not under obligations to Mr. Hyde, and he is qualified by Hyde stock. He was Chairman of the Committee which submitted the Frick report and resigned from the Board of Directors immediately thereafter.

The Executive Committee transacts all the important business of the Society. The Finance Committee is composed of exactly the same men as the Executive Committee with one additional

director, viz.: Mr. Jacob H. Schiff, senior member of the firm of Kuhn, Loeb & Co., which has sold to the Equitable Society, according to its reports, since January 1, 1900, $47,522,000 of bonds and $1,780,000 of stock.

The duties of the Finance Committee are perfunctory.

The Executive Committee votes to buy or sell real estate, make leases, raise salaries, buy or sell bonds or stocks. Those transactions are closed before they reach the Finance Committee. The same men as members of the Finance Committee approve their action as members of the Executive Committee. The only power they have is to advise that the bonds or stocks already bought and paid for be sold at a profit or loss according to the condition of the market. Of course they cannot repudiate or revise ordinary contracts which are closed.

The Board of Directors at the beginning of this year was composed of prominent and distinguished men, who are successful in their various fields of activity. But most of them paid little attention to their duties and obligations as trustees of this very important trust. The annual and quarterly meetings were not largely attended. They seem to have taken no very active interest in the affairs of the Society. The mildest thing which can be said of them is that they were indifferent and careless in the discharge of their obligations and responsibilities.

THE EXECUTIVE OFFICERS.

Mr. James W. Alexander.

President Alexander has been connected with this Society for almost a life time. He has heretofore had the respect and confidence of all who knew him. In his testimony he stated that he was not conscious of any wrong-doing and that he was led to participate in the syndicate transactions of James H. Hyde and Associates by Mr. Hyde without giving the matter such serious consideration as it deserved. The uncontroverted testimony was that he was a participant in them and accepted his share of the profits. He executed the leases that proved to be so detrimental to the Society's interests. He was cognizant of, and ap-

proved the various subsidiary undertakings which we have criticised and by reason thereof has failed to meet the obligations imposed upon him as chief officer of the Society, and it is an open question whether he is not disqualified under section 36 of the Insurance Law from hereafter holding any office in a life insurance company, as well as all the other officers and directors who participated in these unlawful transactions.

Mr. James H. Hyde.

Mr. Hyde, on the death of his father, became the owner of 502 shares of the Equitable Society stock and acquired 35 additional shares, making a good working majority. He knew this and others were quickly made aware of it. He did not hesitate to extract from the Society's treasury $352,500 for his stock in the Missouri Safe Deposit Company, made valuable only by the outrageous leases with the parent Society. He permitted the Society to lose heavily in its business transactions with the Commercial Trust Company of which he is a salaried officer and a large stockholder. He was very active in promoting the transactions by which the present Equitable Trust Company was developed, and he thereby profited largely and became Vice-President at a liberal salary. By reason of the Equitable Society's control of the Mercantile Trust Company he became Vice-President of that institution with a good salary. He has been accustomed to buy large amounts of securities and involve the Society in other important ventures without authority. He has carried large holdings of the Society's stocks in his own name. He exacted salaries out of all proportion to his age, ability or the value of his services, and caused those of his immediate friends and favorites to be unduly advanced. He is mainly responsible for the extravagant salaries allowed many executive officers. He has been accustomed to draw large sums for expenses on his own unitemized vouchers. In fact, he has not seemed to consider himself accountable to anyone for the expenditure of the Society's funds. He introduced and conducted the syndicate transactions and involved others with himself. He forced himself on boards of direction, and into business

relations with prominent men, by the aggressive assertion of his stock control of the Equitable Society, and by those means he gradually assumed dominition of the Society's affairs until the presidency was reduced to a position of secondary importance. His authority continued to increase and he proceeded to use the Society and its assets more and more as if they were his own, until he was checked by the demand for mutualization and his retirement. The policyholders are under great obligations to Mr. Alexander and the other executive officers for taking this step.

Mr. Gage E. Tarbell.

The following charges have been made against Mr. Tarbell by some of the other executive officers:

That he has been extravagant in the administration of the Agency Department.

That he has encouraged or connived at rebating.

That during several months last past he has been allowing to agents four dollars a thousand for new insurance in addition to the regular percentage, without consulting the Executive Committee.

That just before this controversy he received from the Society $135,000 cash in settlement of his claim for commuted commissions in the Chicago agency.

That he encouraged insubordination by inducing executive officers and heads of departments and even clerks to sign a petition against the Vice-President, and that he has been instrumental in circulating literature criticising and slandering certain officers of the Society, in direct violation of a resolution of the Executive Committee.

On these charges I find that in the year 1900 a new system was inaugurated, by which the percentage of first premiums on new business allowed to agents was reduced from sixty to fifty per cent. This made it very difficult for the field agents to compete with those of other large companies, who allowed their agents larger percentages, and therefore the advances to them were increased in order that they might live and continue in the service

of the Society. I doubt if the increased advances amount to as much as 10 per cent. of the first premiums on new business saved, and therefore the Society is not a loser.

Mr. Tarbell swears that he has not even connived at rebating, but that on the contrary he has always denounced and tried to stop it, and no evidence has been adduced in support of this allegation by those who made it.

Mr. Tarbell admits that during the last few months he has been allowing to agents four dollars per thousand on new insurance in addition to the regular percentage, and says this was done after consultation with, and approval of, the President. It does not appear to be a bonus in the ordinary sense of that word, but an extra compensation to sustain the agency force during these trying times. That may have been an error in judgment, but there is much excuse for Mr. Tarbell in striving to keep up the business of the Society and retain its agents.

It appears that the sum of $135,000 paid Mr. Tarbell, was computed in the Auditor's department as the amount due him for his commuted commissions and no evidence has been adduced showing that he was over-paid.

Mr. Tarbell denies that he was instrumental in or encouraged the circulation of literature in criticism of other officers of the Society, and no substantial evidence appears in support of this or the other charges preferred against him.

Investments.

I think it important that the next Legislature should take into consideration the question of the investment of the funds of life insurance companies and establish a standard of investment. As to just how far or to what extent they should be restricted in their investments I am not prepared to offer an opinion at this time. Doubtless that question will be studied and thought out by the time of the next annual meeting of the Legislature. There can be no question, however, of the wisdom of prohibiting the investment of the funds of life insurance companies in subsidiary moneyed and business corporations controlled by life companies,

which occasion the carrying of large balances for the benefit of those companies and for the stockholders who are largely associated in the management of the Society. The suggestion that these large balances were carried for the purpose of enabling the Society to avail itself of the opportunity to purchase securities at a low price is not sustained from the fact that large balances were carried during the years 1903 and 1904, when securities could have been purchased at a much lower level or the money loaned at much higher rates than were being paid by the affiliated companies. If life insurance is to commend itself to the people to provide for those who are left behind, it is important that the business of the insurance companies be conducted on strictly business lines and that extravagance of management and large salaries should be reduced within proper limits.

The Society's Control.

During the progress of this investigation a change in the stock control of the Society has been made, and three trustees have been empowered under a deed of trust to partially mutualize the Society; that is, it is provided that 28 of the directors should be elected by the policyholders and 24 by the stockholders, with the promise that there would be a reduction in the expenses of the company, and that the managers would institute other reforms in the management of the Society which would inure to the benefit of the policyholders. I do not question but what this is the honest intention of those who have acquired the control of the stock of the Society. I do not think, however, that this will go far towards restoring the confidence of the present policyholders or aid in procuring new business for the Society. In my opinion the only thing that will restore that confidence and benefit the company will be the elimination of stock control, and what I deem of equal importance, the elimination of Wall Street control. I early came to the opinion and so expressed myself to the Legislature in the Department's annual report this year, that all the surplus accretions of this Society beyond the seven per cent. dividends on the stock belong to the

policyholders. The Charter provides that the business of the Society should be conducted on the mutual plan, and provides that each policyholder shall be credited with an equitable share of the surplus. And I am confirmed in my opinion by an examination of the statements that were made early in the existence of this Society to the Insurance Department, verified under oath by the President of the Society, that it was a purely mutual company and that all its surplus should be divided in an equitable manner among the policyholders, and still further by an examination of the affidavits made on behalf of the Society to the Commissioner of Taxes and Assessments of the City of New York, containing the statement that no surplus earnings belonged to the stockholders, and that all the accumulations of the Society are held for the benefit of the assured and are free from taxation.

No superficial measures will correct the existing evils in this Society. A cancer cannot be cured by treating the symptoms. Complete mutualization with the elimination of the stock, to be paid for at a price only commensurate with its dividends, is, in my opinion, the only sure measure of relief.

This report, with a copy of the evidence taken on this investigation, will be transmitted to the Attorney-General for such action thereon as he may deem proper.

Respectfully submitted.

Francis Hendricks

Superintendent of Insurance.

ADDENDA.

EXHIBIT I.

THIS INDENTURE, made the ninth day of January, one thousand eight hundred and eighty-three,

BETWEEN The Equitable Life Assurance Society of the United States, a corporation organized and existing under and by virtue of the laws of the State of New York (hereinafter designated as lessor), party of the first part, and The Mercantile Safe Deposit Company, a corporation created under the laws of the State of New York (hereinafter designated as lessee), party of the second part,

WITNESSETH, That the said party of the first part, as lessor, does hereby lease unto the said party of the second part, and the said party of the second part does hereby hire and take, as lessee, the rooms shown on the diagrams hereto annexed and marked C and D, respectively, situated in the basement of the building owned by the said lessor in the City of New York, situated on Broadway, Cedar and Pine streets, and known as the Equitable Building (which diagrams are made part of this lease for the purpose of designating the premises in said basement hereby leased), together with so much of the cellar of said Equitable Building as lies beneath the said rooms and is shown on the said diagram marked D, and the vaults under the sidewalks of the Broadway and Cedar street sides of said Equitable Building, as shown by said diagram, and also the cellar of the building owned by said lessor and known as the Law Library Building, and as shown on said diagram marked D.

TO HAVE AND TO HOLD the said rooms, vaults, cellars and premises with the safes and appurtenances therein for the term of years to commence on the first day of July, one thousand eight hundred and eighty-one, and to end on the first day of January, one thousand nine hundred and one, with the right and privilege

to said lessee, its successors or assigns, to terminate and surrender this lease at the expiration of ten years from the date thereof upon giving to the lessor a previous notice in writing of six months of its or their intention to so terminate the same,

YIELDING AND PAYING therefor yearly and every year during the term hereby granted unto the said lessor, its successors or legal representatives, the yearly rent or sum of fifteen thousand dollars during the whole term hereby granted, to wit: from the first day of July in the year of our Lord one thousand eight hundred and eighty-one to the first day of January in the year of our Lord one thousand nine hundred and one; and if the net amount received by the lessee as rent or compensation for the use or hire of safes in the great iron vaults, shown on the diagrams A and B hereto annexed, upon the demised premises, which shall be rented out (such amount to be ascertained by deducting from the whole amount so received the total expenses of the said lessee), shall amount to so much in any year of the term hereby created that one-half thereof shall exceed fifteen thousand dollars, then and in every such case said lessee agrees to pay to said lessor as rent at the end of such year so much in addition to the said rent of fifteen thousand dollars per annum as shall with the said fifteen thousand dollars make such rent for such year a sum equal to such one-half. It being the intention and agreement of the parties hereunto, and the said lessee hereby covenanting and agreeing that the said rent due and payable hereby shall be fifteen thousand dollars per annum in any event, and so much more as may be necessary with the said fifteen thousand dollars to equal one-half of the net receipts by said lessee from the rent of safes in the aforesaid iron vaults shown on the diagrams marked A and B after deducting the total expenses of the said lessee, if one-half of such net receipts shall exceed fifteen thousand dollars per annum.

All the rent to be paid in lawful money of the United States and said fifteen thousand dollars in quarter yearly payments on the fifteenth days of January, April, July and October in each and every year until the expiration of said term at the principal office of the said lessor in the City of New York, the last quarter's

rent being payable fifteen days after the expiration of the term. It being understood and agreed that the rent over and above said fifteen thousand dollars shall be measured by the net income, calculated as aforesaid from the rental or compensation for the use or hire of the said safes in the aforesaid iron vaults during the year ending December thirty-first in each and every year respectively during the continuance of this lease, and shall be payable on the fifteenth day of January next following for each year ending on said thirty-first day of December then last past; said payments when paid shall be in full for all rent to be paid to the lessor.

And it is Hereby Understood and Agreed, that if at any time or times during the continuance of this lease the said lessor shall be of the opinion that the expenses of the said lessee above allowed to be deducted from the rental of the safes in the aforesaid iron vaults for the purpose of measuring the amount of rent payable hereunder are too large, on the demand of the said lessor there shall be appointed three arbitrators, one to be selected by the said lessor, one by the said lessee, and one, an umpire, by the two persons so chosen as aforesaid, whose duty it shall be to thoroughly investigate all said expenses and outgoings of the said lessee and who shall report with all reasonable promptitude what action shall be taken by the parties hereto with reference to the matter. And it is hereby expressly understood and agreed that the decisions and recommendations of the said arbitrators so chosen shall be accepted and faithfully carried out by the parties hereto without delay.

And the said lessor for the considerations aforesaid hereby covenants and agrees to and with the said lessee, that the said lessor will, at its own expense and charges, alter, furnish and fit up and keep the same fitted up, cleaned, painted and furnished in a proper and suitable manner as will most promote the business of the said lessee, the rooms herein and hereby leased and will, from time to time during the continuance of this lease, erect and fit up at the expense of the said lessor as many safes and of such description as may be necessary for the use of the said lessee in

its business. And will also alter, furnish and fit up and keep the same furnished, cleaned, painted and fitted up in the best manner such portions of the cellars and of the vaults under the sidewalks as shown on the diagram hereto annexed marked D for the use of said lessee in such a manner as shall be required by the general business of said lessee when called upon so to do by said lessee. And all repairs shall be at the expense of the said lessor, not however including the refitting locks throughout the premises.

It being understood that the foregoing provisions as to the amount of rental are intended only as a method of determining the amount of rent hereby reserved, and that this instrument shall not be construed as in any wise creating a partnership between the parties hereto, nor as giving to the lessor any interest in the business of the lessee or any part thereof, nor as giving the lessor any specific lien upon or right to the receipts from the rents of safes or any part thereof.

The above lease is upon the following conditions, all and every one of which the said lessee for itself, its successors and assigns, covenants and agrees to and with the said lessor, its successors and assigns, to keep and perform.

First. That the lessee will, from time to time, during the said term in good faith and diligently prosecute the business of renting out safes upon the demised premises to such extent as the premises afford suitable room for and as there shall be demand for and at the best attainable rents.

Second. In case of the non-payment of the said rent at the said times and place, or in case the said lessee shall make default in the performance of any of the other covenants and conditions herein contained on its part to be performed or fulfilled, or the said premises shall be deserted or vacated, that said lessor shall have the right to re-enter upon the demised premises either by force or otherwise without being liable to any prosecution therefor, and thenceforth to have and to hold the same as of its first and former estate and therefrom to terminate this lease.

Third. Said lessee shall quit and surrender said premises at the end of said term or the termination of any renewal of the said

lease in as good condition as the reasonable use thereof will permit, and all alterations, additions or improvements, including office furniture, shall be the property of the said lessor and shall remain upon and be surrendered with the premises as a part thereof at the termination of this lease, whether such termination be by lapse of time or otherwise, without disturbance, molestation or injury.

Fourth. If during the term of this lease the said Equitable Building or the premises hereby leased be injured by fire or otherwise so as to interfere with the business of the said lessee the said lessor agrees to restore the same and if the said injury is caused by the lessor or its servants the lessor agrees to allow such damages to the lessee as it shall have suffered in consequence of such interference—the amount of such damages to be determined by arbitration if not agreed upon by the parties hereto, their successors or assigns.

In case the said Equitable Building shall be totally destroyed by fire and said lessor shall not rebuild or replace said building, then and in such case this lease and all rights of the parties under the same shall cease and terminate. But in case of such total destruction if the said lessor shall rebuild or replace said building it will if desired by the lessee, its successors or assigns, restore the said leased premises to the same condition as at the time of such destruction and when restored this lease shall continue in full force until the end of the term herein provided for, but no rent shall be paid by the lessee during the period between the date of such destruction and the time when such leased premises shall be restored as herein provided.

Fifth. Said lessor will keep in the hereby leased premises a warming apparatus affording sufficient heat for use from the tenth day of October in each year of this lease to the twentieth day of May following, and will furnish sufficient gas or electric light or other suitable means for lighting said leased premises, and will cause said premises (excepting the vaults and places of deposit) to be cleaned and properly cared for by the Janitor of its building.

Sixth. And it is further agreed that any difference which may arise as to the construction of this lease or any part thereof shall be referred to the decision of three persons to be selected as follows—one by the said lessor, one by the said lessee and an umpire to be selected by the said two persons chosen as aforesaid by the parties hereto—the decision of the said three persons or if they shall not all agree, of a majority of them, shall be rendered with reasonable promptitude and shall be final and conclusive upon the parties.

Seventh. It is further understood and agreed that there shall be a monthly statement rendered by the said lessee to the said lessor, which shall give a full statement of the number of safes under rental and the amount of income derived from the rental or compensation for the use of the safes in the two great vaults aforesaid, and the total expenses calculated as hereinbefore provided to be deducted in measuring the rent. This statement to be made out and written upon a blank to be furnished by the said lessor.

Eighth. And the said lessee further agrees that said lessee will at all reasonable times give information with regard to such portion of its affairs as will enable said lessor to be fully cognizant of its rights in the premises.

Ninth. It is understood that the corporate existence of the said lessee will terminate in the year one thousand nine hundred and twenty-five, but it is the desire and intention of both parties to these presents that there should be a renewal and continuance of such corporate existence, either by such legislation as will secure such continuance, or in default of such legislation that a new corporation should be formed having the same or similar powers and franchises as are now held by the lessee, and which shall become the successor in interest of said lessee, and that the said leased premises should continue to be used for the purposes hereinbefore specified for a further period of fifty years from the termination of this lease.

And the said lessor does hereby covenant and agree to and with the said lessee, that in case the corporate existence of the said

lessee shall be lawfully renewed or continued for an additional period of fifty years, or if a corporation shall be formed at or before the time the corporate existence of said lessee shall terminate, which shall succeed to or be the assignee of the remainder of the term hereby granted, and shall also possess the same or similar rights, powers or franchises as are now possessed by the said lessee, and said lessee or said new corporation shall elect or take a renewal or continuance of this lease and a new lease for an additional period of fifty years upon the same terms, conditions and agreements as are herein contained, then and in such case the said lessor will execute to said lessee or its assignee or successor a new lease of said premises hereby leased for such additional term of fifty years, upon the same rents, covenants and agreements as are herein contained.

Tenth. It is the intention of both the parties to this lease that the premises hereby demised, shall after the expiration of the period of the new or continued lease provided for in the ninth subdivision hereof be again leased to the lessee or its assignee or successor in interest for an additional period of fifty years, provided the said lessee or its successor in interest or assignee shall be in law capable of taking such renewed lease.

And it is Mutually Agreed by and between the parties to these presents that if said lessee or its assignee or successor in interest being so capable of taking such lease, shall desire such new or further lease of said premises, and the lessor and said lessee or its assignee or successor shall not be able to agree upon the terms thereof, then on the demand of said lessee or its assignee or successor there shall be appointed three arbitrators, one to be selected by the said lessor, one by said lessee or its successor and one an umpire by the two persons so chosen as aforesaid, who shall decide what action shall be taken by the said parties in reference to the matter. And it is hereby expressly understood and agreed that the decision of the said arbitrators so chosen, or the decision of any two of them if all three are unable to agree, shall be accepted and faithfully carried out by the said lessor and by said lessee or its said successor in interest.

Eleventh. It is Mutually Agreed by and between the parties to these presents that upon the final termination of this lease, or of any renewal or continuance thereof or of any new lease made in pursuance of the provisions herein contained whether said termination shall arise from a termination by lapse of time or by a surrender thereof as herein provided for, the said lessor shall purchase from said lessee, its successors in interest or assignee, the good will of the business of said lessee, its successors or assignee, at said premises and shall pay therefor such sum as shall be then mutually agree upon by the parties in interest at that time. And in case said sum cannot be so agreed upon then the same shall be fixed and determined by arbitration, the arbitrators to be selected in the same manner as is hereinbefore provided for in case of failure of the parties to agree, and the decision of said arbitrators or of a majority of them, if all three shall not agree, shall be final and shall be accepted as binding on such parties and the lessor shall pay to the lessee, its successors in interest or assignee, the sum so determined by said arbitrators as the value of such good will. Or if said lessee shall demand a further continuance of said lease, that the terms of the same shall be settled by arbitration in like manner.

In Witness Whereof the said lessor has caused its corporate seal to be hereunto affixed, and these presents to be signed by its Vice President and Secretary, and the said lessee has caused its corporate seal to be hereunto affixed and these presents to be signed by its President and Secretary, the day and year first herein written. In duplicate.

(Signed) THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE U. S.

by James W. Alexander, *Vice-President.*

(seal) W. Alexander, *Secretary.*

(Signed) THE MERCANTILE SAFE DEPOSIT CO.

Lyman Rhoades, *President.*

(seal) E. M. Billings, *Secretary.*

EXHIBIT II.

THIS INDENTURE, made the first day of January, in the year eighteen hundred and eighty, between the Equitable Life Assurance Society of the United States (a corporation created under the laws of the State of New York) hereinafter designated as the Lessor, party of the first part, and the Equitable Safe Deposit Company (a corporation duly established under the laws of Massachusetts, and having its usual place of business in Boston, in said Commonwealth) hereinafter designated as the Lessee, party of the second part:

1. WITNESSETH: That in consideration of the covenants, herein contained, on the part of the said party of the second part, and its representatives, to be kept and performed, the said party of the first part doth hereby grant, demise and lease unto the said party of the second part, its successors and assigns, the rooms numbered 4 and 5, and the vaults, fixtures and furniture therein, in the basement and cellar stories of the building known as the Equitable Life Assurance Society's Building, situated on the southeast corner of Milk and Devonshire streets, and other premises adjoining thereto, in the City of Boston and Commonwealth of Massachusetts, being the portion marked red on the annexed diagrams marked A and B, and the said adjoining premises marked C respectively; (that marked C being the cellar and first and second stories of the building Nos. 7 and 9 Federal street, belonging to Charlotte A. Johnson and adjoining the Equitable Building, and subject to the lease made to The Equitable Life Assurance Society by the said Charlotte A. Johnson;) to be used for the purposes of the corporation and for similar purposes; with the right to use, free of charge, in common with others, the elevators in said building, and the water closets on the said premises.

2. And the Lessor covenants and agrees with the Lessee, its executors, administrators and assigns, that it will at its own expense heat, light, furnish water and keep neat and clean the stairs, entries, and water closets in said building, and also the premises marked A, B, and C on the annexed diagrams.

3. To have and to hold the said rooms and other premises, hereby demised, with the rights, easements and appurtenances thereto belonging, unto the party of the second part, its successors and assigns, from the first day of January, in the year eighteen hundred and eighty, during the full term of twenty-five years thence next ensuing, including and counting said first day of January as part of said term; that is to say, the said term shall be regarded as commencing on and with said first day of January, A. D. 1880, and as ending on the first day of January, A. D. 1905, unless sooner terminated, as hereinafter provided, yielding and paying (except only in case of fire and other casualty as hereinafter mentioned) the rent or sum of one hundred dollars per year for each year of the said term, payable in yearly payments; the first payment to be made on the thirty-first day of December, 1880; and if this lease should terminate for any cause between two rent days, a proportionate part of said annual rent to be paid up to such termination; provided, moreover, that in each and every year during the term of this lease in which the net income from the rental of boxes, safes and places of deposit in the two interior great vaults of the company, calculated as hereinafter set forth, received by the lessee shall exceed the sum of sixteen thousand dollars ($16,000) one-half of said excess over said sixteen thousand dollars ($16,000) shall be paid as additional rent to the lessor until the said one-half excess amounts, with the one hundred dollars aforesaid, to the sum of twenty thousand dollars ($20,000), which sum shall be the maximum rent to be paid to the said lessor in any one year. It being the intention of this agreement: 1st. That the lessors shall receive in any event the above specified rent of one hundred dollars. 2d. That the lessees shall next, if the net receipts shall be sufficient therefor, receive sixteen thousand dollars ($16,000) per year. 3d. That next, all the net receipts above sixteen thousand dollars ($16,000) shall be equally divided between said lessor and lessee, until the lessor's rent reaches the sum of twenty thousand dollars ($20,000) per year, as above stipulated. Provided, however, that in case the amount to be paid to the lessor in any one

year does not amount to twenty thousand dollars ($20,000) then nothing shall be paid to said lessor from the receipts of any succeeding year on account of such deficiency.

4. All the rent to be paid at the principal office of the said lessors in the City of New York, in lawful money of the United States. It being understood and agreed that the rent, over and above said amount of one hundred dollars, shall be payable on the twenty-fifth day of January next following, for each year ending on the first day of January then last past.

5. To determine the net income for the purposes of this agreement, the accounts of the lessee, for all moneys received by it for the rent of boxes, safes and places of deposit in the two interior great vaults of the Company, and for all moneys expended by it in the conduct of its business, except the amounts paid as dividends and interest shall be made up each year during the continuance of this agreement, to and including the thirty-first day of December, and the sum of money remaining after deducting the expenditures from the receipts as above described, shall be considered the net income for said year.

6. And if at any time or times during the continuance of this lease the said lessor, its successors or assigns, is of the opinion that the expenditures of the said lessee are too large, it is hereby understood and agreed that on the demand of the said lessor, its successors or assigns, there shall be appointed three arbitrators, one by the said lessor, its successors or assigns, one by the said lessee, its successors or assigns, and one by the two persons so chosen as aforesaid. In case the said lessee shall neglect to appoint an arbitrator after ten days' demand in writing by said lessor, its successors or assigns, the said lessor, its successors or assigns, shall have the right to appoint two arbitrators who shall choose a third.

7. It shall be the duty of said arbitrators to hear the parties and thoroughly investigate all said expenditures of the said lessee, its successors or assigns, and report with all reasonable promptitude, giving each party reasonable notice of the time and place of hearing, what action shall be taken by the parties hereto

with reference to the matter; and it is hereby expressly agreed that the decisions and recommendations of a majority of the said arbitrators so chosen shall be final and conclusive upon the parties.

8. And the said lessor, its successors and assigns, for the consideration aforesaid, hereby covenants and agrees to and with the said lessee, its successors and assigns, that the said lessor, its successors and assigns, will, at its own expense and charges, alter, furnish and fit up in a proper and suitable manner, all the rooms herein and hereby leased, according to the schedule hereto annexed and marked X; and will, from time to time, during the continuance of this lease, erect and fit up, at the expense of the said lessor, its successors and assigns, as many safes and of such description as may be in the opinion of both lessee and lessor, their successors and assigns, necessary for the use of the said lessee in its business; line the interior of the lower granite vault with steel or otherwise, in the most approved manner, whenever the same shall be required for safes, and will also alter, furnish and fit up in the best manner, such portions of the cellars and of the vaults under the sidewalks and the adjoining premises leased from the said Charlotte A. Johnson for the use of said lessee, as shall be in the opinion of both lessee and lessor, their successors and assigns, required by the business of said lessee, its successors or assigns. And all extraordinary repair shall be at the expense of the said lessor, its successors or assigns, not, however, including minor repairs such as refitting locks and replacing window glass. And in case of any disagreement between the said lessor and lessee, their successors and assigns, with regard to this article (paragraph 8) the same rule for arbitration as provided in paragraphs 6 and 7 above, shall be applied, provided that on demand of the lessee, its successors or assigns, there shall be chosen three arbitrators, one by the lessee, its successors or assigns, one by the lessor, its successors or assigns, and one by the two so chosen, and in case the lessor, its successors or assigns, shall neglect after ten days demand in writing, to appoint an arbitrator, the lessee, its successors or assigns, shall have the right to appoint two arbitrators who shall appoint a third arbitrator.

9. It being understood that the foregoing provisions as to the amount of rental are intended only as a method of determining the amount of rent hereby reserved; and that this instrument shall not be construed as in any wise creating a partnership between the parties hereto, nor as giving to the lessor any interest in the business of the lessee, or any part thereof, nor as giving the said lessor any specific lien upon or right to the receipts from the rent of safes, or boxes, or places of deposit in the great vaults, or any part thereof.

10. And the said lessee, for itself and its successors and assigns, hereby covenants and agrees to and with the said lessor, its successors and assigns, that said lessee, its successors and assigns, will, during the said term, and for such further time as it or any other person or persons claiming under it shall hold the said premises, or any part thereof, pay unto the said lessor, its successors or assigns, the said rent, as aforesaid (except only in case of fire or other casualty, as hereinafter mentioned).

11. And the said lessee, its successors and assigns, further covenants and agrees to and with the said lessor, its successors and assigns, that it will keep all and singular the said premises in as good repair as the same are in at the commencement of said term, or may be put in during the continuance thereof, reasonable use and wearing thereof and damage by fire or other inevitable casualty excepted; that it and its clerks, servants and agents will in all things observe and perform the rules and regulations in regard to the said building, printed upon the back of this lease, and to which this lease is especially made subject; and further that it will indemnify and save harmless the said lessor, and those having its estate in the premises, for all loss and damage occasioned by the negligent use or misuse or abuse of the Cochituate water, or of the water fixtures or of the steam heating apparatus, or of the lighting apparatus by the said lessee or by those having its estate in the premises, or by any person or persons claiming under it, and at its own cost and charge pay for all such damage.

12. And the said lessee for itself, its successors and assigns, further covenants and agrees to and with the said lessor, its successors and assigns, as a condition of this lease, that said lessee

or those having its estate in the premises, will not make or permit to be made, any alterations or additions during the term aforesaid, in or to the said demised premises or any part thereof that shall violate any of the provisions of the said lease of Charlotte A. Johnson to the lessor of the building containing a part of the demised premises, or that shall be injurious to the main building of the lessor; and also, that it shall be lawful for the said lessor and those having its estate in the premises, and for any agent or attorney authorized thereto by it, at all reasonable times to enter into and upon the same, to examine the conditions thereof, and make all needed repairs; and further that the said lessee and those having its estate in the premises, shall and will, at the expiration of the said term or termination of its interest and estate in the demised premises, peaceably yield and give up unto the said lessor or those having its estate therein, all and singular, the premises, and all fixtures and future erections and additions to or upon the same, in good order and condition in all respects, reasonable wearing and use thereof and damage by fire and other casualties excepted.

13. Provided always, and these presents are upon this condition, that if the said lessee or its representatives or assigns do or shall neglect or fail to perform and observe any or either of the covenants contained in this instrument, which on its part are to be performed, or if the said lessee shall be declared bankrupt or insolvent, according to law, or if any assignment shall be made of its property for the benefit of creditors, or if said term, or the lessee's interest therein, or in the demised premises, shall be attached or taken on execution, or upon any legal process, then, and in either of the said cases, if said breach shall continue for thirty days after notice of the same given in writing by the lessor, or those having its estate in the premises to the lessee, or those having its estate in the premises, the lessor, or those having its estate in the premises, lawfully may, immediately, or at any time thereafter, and whilst such neglect or default continues, and without further notice or demand, except as aforesaid, enter into or upon the said premises, or any part

thereof, in the name of the whole, and repossess the same as of its former estate, and expel the said lessee and those claiming under it, and remove its effects (forcibly if necessary) without being taken or deemed guilty of any manner of trespass, and without prejudice to any other remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and that thereupon this lease shall, if the lessor so elect, determine, cease, and be at an end.

14. It is further hereby expressly agreed, that if any merchandise or property that may be in the premises during said term shall be injured or destroyed by water or otherwise, no part of such loss or damage shall be borne by the lessor, unless the same shall occur by reason of the carelessness or negligence of any servant or agent of the lessor, or otherwise; also, that the said lessee will use no chemical burning fluids or alcohol in lighting said premises; also, will pay all extra insurance on the building, if any be required, on account of extra risk in the use of the premises thus leased, and in no way whatever will invalidate any policies of insurance on the same.

15 And the said lessor, its successors or assigns, covenants and agrees with the said lessee, its successors and assigns, that it and they paying the rent and charges aforesaid, and performing the covenants herein contained, on its and their part to be paid and performed, shall peaceably hold and enjoy the said demised premises, until the end of said term or such earlier determination of this lease as is hereinbefore provided.

16. It is further understood and agreed that there shall be a quarterly statement rendered by the said lessee, its successors and assigns, to the said lessor, its successors or assigns, which shall give a full statement of the number of safes under rental, and the amount of income derived from the rental or compensation for the use of safes or places of deposit, and the expenses above allowed to be deducted in measuring the rent. This statement to be made out and written upon a blank to be furnished by the said lessor. And the said lessee, for itself, its successors and assigns, further agrees that the said lessee, its successors and assigns, will, at all reasonable times, give information with regard

to such portion of its affairs as will enable said lessor, its successors or assigns, to be fully cognizant of its rights in the premises.

17. It is further agreed that if the said lessee, its successors or assigns, shall, in writing, give notice to said lessor, its successors or assigns, on or before the first day of October, A. D., one thousand nine hundred and four, of its desire to renew this lease for twenty-five years from said first day of January, A. D., 1905, then the lessor, its successors or assigns, shall so renew this lease, upon the same terms and with all its covenants, except the agreement set forth in this paragraph (No. 17).

18. It is further agreed, that if the said lessee, its successors or assigns, shall, in writing, give notice to said lessor, its successors or assigns, on or before the first day of October, A. D., one thousand nine hundred and twenty-nine, of its desire to renew this lease for twenty-five years from the first day of Januuary, A. D., 1930, then the lessor shall so renew this lease upon the same terms and with all its covenants, except the agreements set forth in this and the preceding paragraphs (Nos. 17 and 18).

19. It is further agreed that if the said lessee shall in writing give notice to said lessor on or before the first day of October, A. D., one thousand nine hundred and fifty-four, of its desire to renew this lease for twenty-five years from the first day of January, A. D., 1955, then the lessor shall so renew this lease upon the same terms and with all its covenants, except the agreements set forth in this and the preceding paragraphs (Nos. 17, 18 and 19).

20. And it is further agreed that if the said Lessee, its successors or assigns, shall, in writing, give notice to said Lessor, its successors and assigns, on or before the first day of October, A. D. 1979, of its desire to renew this lease for one hundred years from the first day of January, A. D. 1980, then the Lessor, its successors and assigns, shall so renew this lease upon the same terms and with all its covenants, except the agreements set forth in this and the preceding paragraphs (Nos. 17, 18, 19 and 20). And as to the estate leased to Charlotte A. Johnson. Provided,

however, that if the said Lessor shall, on or before the first day of January, A. D. 1980, have paid to the Lessee for its good will a sum of money equal to six times the gross receipts of the said Lessee during the year of 1979, then the said Lessor shall be under no obligation to grant the last mentioned renewal.

21. The said Lessor, its successors or assigns, shall have the right, if at any time it or they shall sell the said building, or that the whole or any part of the demised premises or of the buildings of which they form a part, shall be taken for a street, or for any public use or shall be destroyed or damaged by fire or other casualty during said term to terminate this lease on payment of such a sum as shall be equal to six times the gross receipts of the said Lessee, or its successors or assigns, for the year next preceding the said sale. Provided, however, in the event of such sale or other termination as aforesaid that the said sum to be so paid shall be at least equal to the sum of two hundred thousand dollars.

IN WITNESS WHEREOF, the said Lessor has hereunto caused its corporate seal to be affixed and the same to be signed by Henry B. Hyde, its President, and the said lessee has hereunto caused its corporate seal to be affixed and the same to be signed by E. L. S. Hammond, its Treasurer, the day and year first above mentioned.

Signed, sealed and delivered
in the presence of
(Signed) SAMUEL W. BATES.

[L. S.]
SEAL OF THE EQUITABLE LIFE ASSURANCE SOCIETY

(Signed) HENRY B. HYDE, *President*
Equitable Life Assurance Society of the United States.

Attest. (Signed) SAMUEL BORROWE, *Secretary.*
(Signed) E. L. S. HAMMOND, *Treasurer*
of Equitable Safe Deposit Company.

[L. S.]
SEAL OF THE EQUITABLE SAFE DEPOSIT CO.

EXHIBIT III.

AGREEMENT, made this eighth day of November, 1888, between The Equitable Life Assurance Society of the United States, party of the first part, and The Security Safe Deposit Company, party of the second part:

Whereas, The party of the first part heretofore executed a lease to the Equitable Safe Deposit Company, bearing date the first day of January, 1880, of certain premises located on Federal and Milk streets in the City of Boston, for the use of the said Equitable Safe Deposit Company in carrying on its business; and

Whereas, the party of the second part hereto has succeeded to the rights of the said Equitable Safe Deposit Company under said lease; and

Whereas, the party of the first part has now constructed a new building at the corner of said Federal and Milk streets in the City of Boston connected with the building, including the premises covered by the aforesaid lease, and the party of the first part has agreed to lease to the party of the second part the basement and ground floor of said new building:

Now therefore this AGREEMENT Witnesseth: That the party of the first part, in consideration of the premises, and of the terms and conditions for the payment of rent provided for in said lease does hereby lease to the said party of the second part said basement and ground floor of said new building, the same to be added to and become a part of the premises included in and covered by said lease.

The consideration for the lease of said basement and ground floor to be of the same character and to the same extent in regard to said basement and ground floor as are provided for in said lease of January 1, 1880.

The true intent of this agreement being that said basement and ground floor of said new building shall be and become part of the premises covered by said lease, the same as though they had been included in it at the time of the execution thereof.

And the party of the second part in consideration of the agreement of the party of the first part herein contained agrees to

accept the lease of said basement and ground floor of said new building upon the same terms and conditions with regard to the payment of rent and of all other matters as are contained in said lease of January 1, 1880.

It is further specially agreed by and between the parties hereto, that the said lessor shall have the right to supply its own janitor of said premises, or to have the same taken care of by a janitor to be provided by the lessee upon such terms as may be agreed upon between the parties hereto, making an allowance to the Security Safe Deposit Company.

IN WITNESS WHEREOF, the said lessor has caused its corporate seal to be hereunto affixed, and these presents to be signed by its Vice-President and Secretary, and the said lessee has caused its corporate seal to be hereunto affixed and these presents to be signed by its President and Secretary, the day and year first herein written. In duplicate.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE U. S.

(Signed) by JAMES W. ALEXANDER, *Vice-President.*

(Signed) W. ALEXANDER, *Secretary.*

[SEAL]

THE SECURITY SAFE DEPOSIT COMPANY,

(Signed) by EZRA FARNSWORTH, *President.*

(Signed) E. L. S. HAMMOND, *Treasurer.*

[SEAL]

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } *ss.:*

BE IT REMEMBERED that on this 8th day of November, A. D. 1888, before me, A. R. Fullerton, a Notary Public of the State of New York, in and for the county of Kings, certificate filed in New York County and residing in said county of Kings, personally appeared James W. Alexander, the Vice-President of the Equitable Life Assurance Society of the United States, and William

Alexander, the Secretary of the same society, to me respectively and personally known to be such, did depose and say, that he, said James W. Alexander, resided in the City of New York, New York, that he, said William Alexander, resided in the City of New York, New York, that he, said James W. Alexander, was the Vice-President of the said Society, and that he, said William Alexander, was the Secretary of the said Society, that they know the corporate seal of said Society, that the seal affixed to the annexed instrument is such corporate seal, that it was so affixed thereto by the order of the Board of Directors of said Society, and that they, the said James W. Alexander and William Alexander signed their names thereto by the like order, as Vice-President and Secretary of the said Society respectively.

And the said James W. Alexander as Vice-President, and William Alexander as Secretary above mentioned, further acknowledged to me that they had executed the said instrument to be their free and voluntary act and deed of said Society for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal on the day and year above written.

[SEAL]

(Signed) A. R. FULLERTON,
Notary Public, Kings County.
(Certificate filed in New York County.)

EXHIBIT IV.

THIS INDENTURE, made the ninth day of November, 1888, between The Equitable Life Assurance Society of the United States, a corporation organized and existing under the laws of the State of New York, herein designated as lessor, party of the first part, and The Missouri Safe Deposit Company, a corporation created under the laws of the State of Missouri, herein designated as the lessee, party of the second part, WITNESSETH:—

WHEREAS, by a certain indenture of lease, bearing date the second day of January, 1886, the party of the first part hereto did

lease unto the Mercantile Trust Company certain rooms in and portions of the building owned by the said party of the first part, and known as the Equitable Building, located on the northwest corner of Locust and Sixth streets, in the City of St Louis, in the State of Missouri; and,

WHEREAS, the said indenture of lease was duly assigned by the said The Mercantile Trust Company to the party hereto of the second part; and,

WHEREAS, the party of the second part, lessee as aforesaid, has asked that the rooms and portions of the building known as the Equitable Building in the City of St. Louis, in the State of Missouri, and now held by the said lessee under the terms of the said lease bearing date the second day of January, 1886, be more fully described, and the lessor having consented thereto; and,

WHEREAS, both parties to the said lease desire certain other changes in the terms thereof:

NOW THEREFORE THIS INDENTURE WITNESSETH, that the said indenture of lease, bearing date the second day of January, 1886, is by mutual agreement cancelled, and the party of the second part hereto does hereby surrender the same, which surrender is accepted by the lessor hereinbefore named, and the following is substituted and accepted by both parties hereto as the lease of said rooms and portions of said building, in place of the covenants, agreements, and provisions in said surrendered lease contained, namely:

1. That in consideration of the covenants herein contained on the part of the said party of the second part and its representatives, to be kept and performed, the said party of the first part doth hereby grant, demise, and lease unto the said party of the second part, its successors and assigns, the following described rooms and portions of the building known as the "Equitable Building," and situated on the northwest corner of Locust and Sixth streets, in the City of St. Louis and State of Missouri, to-wit: Rooms D, E, F, G, H, I, J, K, and L in the basement of said building, as shown on diagram "A," hereto annexed and colored red thereon, and vaults 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in the sub-basement of said building, as shown on diagram "B," hereto

annexed and colored red thereon; to be used for the purposes of the corporation, and for similar purposes, with the right to use, free of charge, in common with others, the elevators in said building and the water-closets on said premises.

2. And the lessor covenants and agrees with the lessee, its successors, legal representatives and assigns, that it will, at its own expense heat, light, furnish water and keep neat and clean the stairs, entries, and water-closets in said building, and also the premises marked on the annexed diagrams.

The said lessor shall have the right to supply its own janitor of said premises, or to have the same taken care of by a janitor to be provided by the lessee upon such terms as may be agreed upon between the parties hereto, making an allowance to the lessee for such services.

3. To have and to hold the said rooms and other premises hereby demised with the rights, easements, and appurtenances thereto belonging unto the party of the second part, its successors and assigns, from the first day of April, 1886, during the full term of twenty-five years thence next ensuing, including and counting said first day of April as part of said term; that is to say, the said term shall be regarded as commencing on and with said first day of April, A. D., 1886, and as ending on the thirty-first day of March, A. D., 1911, unless sooner terminated as hereinafter provided, yielding and paying (except only in case of fire or other casualty as hereinafter mentioned), the rent sum of one hundred ($100) dollars per year, for each year of the said term, payable in yearly payments, the first payment to be made on the thirty-first day of March, 1887; and if this lease should terminate, for any cause, between two rent days, a proportionate part of said annual rent to be paid up to such termination.

Provided, moreover, that in each and every year during the term of this lease in which the net income from the rental of boxes, safes, and places of deposit in the interior great vault of the Company, calculated as hereinafter set forth, received by the lessee shall exceed the sum of twenty thousand ($20,000) dollars, one-half of said excess over said twenty thousand dol-

lars shall be paid as additional rent to the lessor, so long as such rents continue to exceed the sum of twenty thousand dollars during the continuance of this lease (until the said one-half excess amounts, with the one hundred dollars aforesaid, to the sum of twenty thousand dollars, which sum shall be the maximum rent to be paid to the said lessor in any one year). It being the intention of this agreement: 1. That the lessors shall receive, in any event, the above specified rent of one hundred dollars. 2. That the lessors shall next, if the net receipts shall exceed the sum of twenty thousand dollars, receive one-half of the excess of said rents above said sum of twenty thousand dollars per year. 3. That next, all the net receipts above twenty thousand dollars shall be equally divided between said lessor and lessee, until the termination of this lease, but not to exceed $20,000 to the lessor in any one year. Provided, however, that in case the amount to be paid the lessor in any one year does not amount to twenty thousand dollars, then nothing shall be paid to said lessor from the receipts of any succeeding year on account of such deficiency.

4. All the rent to be paid at the principal office of the said lessor in the City of New York, in lawful money of the United States, it being understood and agreed that the rent over and above said amount of one hundred dollars shall be payable on the first day of April for the year ending on the thirty-first day of March then last past.

5. To determine the net income for the purposes of this agreement, the accounts of the Lessee for all moneys received by it for the rent of boxes, safes, and places of deposit in the great vault of the company, and for all moneys expended by it in the conduct of its business, except the amounts paid as dividends and interest, shall be made up each year during the continuance of this agreement to and including the thirty-first day of March, and the sum of money remaining after deducting the expenditures from the receipts as above described, shall be considered the net income for said year.

6. And if, at any time or times during the continuance of this lease, the said lessor, its successors or assigns, is of the opinion

that the expenditures of the said lessee are too large, it is hereby understood and agreed that upon demand of the said lessor, its successors or assigns, there shall be appointed three arbitrators, one by the said lessor, its successors or assigns, one by the said lessee, its successors or assigns, and one by the two persons so chosen, as aforesaid. In case the said lessee shall neglect to appoint an arbitrator after ten days' demand in writing by the said lessor, its successors or assigns, the said lessor, its successors or assigns, shall have the right to appoint two arbitrators, who shall choose a third.

7. It shall be the duty of said arbitrators to hear the parties and thoroughly investigate all said expenditures of the said lessee, its successors or assigns, and report with all reasonable promptitude, giving each party reasonable notice of the time and place of hearing, what action shall be taken by the parties hereto with reference to the matter.

And it is hereby expressly agreed that the decisions and recommendations of a majority of the said arbitrators so chosen shall be final and conclusive upon the parties.

8. The said lessor agrees that it will, during the continuance of this lease, pay all taxes and assessments on said property, or which may be levied or due from the lessee to any state, community or municipality; that it will pay all expenses of protecting said property hereby leased; that it will at its own expense make all repairs, replacements, and additions, if the business requires it, to the said premises, and the appurtenances, including vaults, safes, locks, desks, signs, carpets, and all other property and that on the demand of the lessees it will, if the business justifies it, increase at its own expense the facilities for doing business on such premises by making the additions aforesaid, it being understood that the persons who shall guard the said premises and the clerks shall be employed and paid by the lessee.

9. It being understood that the foregoing provisions as to the amount of rental are intended only as a means of determining the amount of rent hereby reserved, and that this instrument shall not be construed as in any wise creating a partnership

between the parties hereto, nor as giving to the lessor any interest in the business of the lessee or any part thereof, or any control thereof, nor as giving the said lessor any specific lien upon or right to the receipts from the rents of safes, or boxes, or places of deposit in the great vaults, or any part thereof.

10. And the said lessee, for itself, and its successors and assigns, hereby covenants and agrees to and with the said lessor, its successors and assigns, that during the said term and for such further time as it or any other person or persons claiming under it shall hold the said premises or any part thereof, will pay unto the said lessor, its successors or assigns, the said rent as aforesaid, except only in case of fire or other casualty as hereinafter mentioned.

11. And the said lessor, its successor and assigns, further covenants and agrees to and with the said lessee, its successors and assigns, that it will keep all and singular the said premises in as good repair as the same are in at the commencement of said term, damage by fire or other inevitable casualty excepted. The said lessee agrees that the clerks, servants, and agents, will in all things observe and perform the rules and regulations in regard to the said building, which from time to time, may be enacted.

12. And the said lessee, for itself, its successors and assigns, further covenants and agrees to and with the said lessor, its successors and assigns, as a condition of this lease, that the said lessee or those having its estate in the premises, will not make or permit to be made any alterations or additions during the term aforesaid, in or to the said demised premises or any part thereof that shall violate any of the provisions of the said lease, or that shall be injurious to the building or the said lessor.

And, also, that it shall be lawful for the said lessor, and those having its estate in the premises, and for any agent or attorney specifically authorized in writing thereto by it at all seasonable times to enter into and upon the same to examine the conditions thereof and make all needed repairs. And, further, that the said lessee, and those having its estate in the premises, shall and will, at the expiration of the said term, or expiration of its interest

and estate therein, surrender all and singular the premises and all fixtures and future erections and additions to or upon the same in good order and condition in all respects, reasonable wearing and use thereof and damage by fire or other casualties excepted.

13. Provided, always, and these presents are upon this condition, that if the said lessee or its representatives or assigns, do or shall neglect or fail to perform or observe any or either of the covenants contained in this instrument which on its part are to be performed, after six months notice of the same given in writing by the lessor, or those having its estate in the premises, to the officers and directors of the Missouri Safe Deposit Company, or those having its estate on the premises, and while such neglect or default continues, and without further notice or demand except as aforesaid, the said lessor may enter into or upon the said premises or any part thereof, in the name of the whole, and repossess the same as of its former estate, and expel the said lessee and those claiming under it, and remove its effects (forcibly if necessary) without being taken or deemed guilty of any manner of trespass and without prejudice to any other remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and that thereupon this lease shall, if the lessor so elect, determine, cease, and be at an end.

14. And the said lessor, its successors and assigns, covenants and agrees with the said lessee, its successors and assigns, that the said lessee (they paying the rent and charges aforesaid and performing the covenants herein contained on its and their part to be paid and performed) shall peaceably hold and enjoy the said demised premises until the end of said term or such earlier determination of this lease as is hereinafter provided.

15. It is further understood and agreed that there shall be a quarterly statement rendered by the said lessee, its successors or assigns, to the said lessor, its successors or assigns, which shall give a full statement of the number of safes under rental, and the amount of income derived from the rental or compensation for the use of safes or places of deposit, and the expense above allowed to

be deducted in measuring the rent, this statement to be made out and written upon a blank to be furnished by the said lessor.

And the said lessor, for itself, its successors and assigns, further agrees that said lessee, its successors or assigns, will, at all reasonable times, give information with regard to such portion of its affairs as will enable said lessor, its successors or assigns, to be fully cognizant of its rights in the premises.

16. It is further agreed that if the said lessee, its successors or assigns shall, in writing, give notice to said lessor, its successors or assigns, on or before the first day of January, A. D. 1911, of its desire to renew this lease for a further term of fifty years from the said first day of April, A. D. 1911, then the lessor, its successors or assigns, shall so renew this lease upon the same terms and with all its covenants, except the agreement set forth in this paragraph No. 16.

17. It is further agreed that if the said lessee, its successors or assigns, shall in writing give notice to the said lessor, its successors or assigns, on or before the first day of January, 1961, of its desire to renew this lease for fifty years from the first day of April, 1961, then the lessor shall so renew this lease upon the same terms and all its covenants, except the agreement set forth in this and the preceding paragraphs Nos. 16 and 17.

18. The said lessor, its successors or assigns, shall have the right, if, at any time, it or they shall sell the said building, or if the whole or any part of the demised premises or of the buildings of which they form a part, shall be taken for a street or for any public use, or shall be destroyed or damaged by fire or other casualty during said term, to terminate this lease on payment of such a sum as shall be equal to six times the gross receipts of the said lessee, or its successors or assigns for the year next preceding the said sale.

Provided, however, in the event of such sale or other termination as aforesaid, that the said sum so paid shall be at least equal to the sum of two hundred thousand dollars.

In witness whereof, the said lessor has caused its corporate seal to be hereunto affixed, and these presents to be signed by

its Vice-President and Secretary, and the said lessee has caused its corporate seal to be hereunto affixed and these presents to be signed by its President and Secretary the day and year first herein written. In duplicate.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

[SEAL] (Signed) By JAMES W. ALEXANDER,
Vice-President.

(Signed) W. ALEXANDER,
Secretary.

THE MISSOURI SAFE DEPOSIT COMPANY,

[SEAL] (Signed) By JAMES JAUNCEY HOYT,
President.

Attest:

(Signed) J. S. KENDRICK, *Secretary.*

EXHIBIT V.

THIS AGREEMENT, made this twentieth day of December, 1894, between The Equitable Life Assurance Society of the United States, a corporation organized and existing under the laws of the State of New York, party of the first part and The Missouri Safe Deposit Company, party of the second part, witnesseth,

WHEREAS, The Equitable Life Assurance Society of the United States made a lease on the second day of January, 1886, to The Mercantile Trust Company, which lease together with other premises subsequently by an agreement dated the ninth day of November, 1888, came into possession of the party of the second part,

NOW THIS AGREEMENT WITNESSETH, That for and in consideration of one dollar to it in hand paid, the receipt whereof is hereby acknowledged, the parties hereto hereby agree that the description contained in said lease and said subsequent agreement be so amended and changed as to include the rooms M and N indicated on the diagram, which is hereto annexed and forms

POOR COPY

a part of this agreement, such additional space being held under terms and conditions of the original agreement and the amendments thereof and the same to be held without further cost or rental to the party of the second part.

IN WITNESS WHEREOF, The said lessor has caused its corporate seal to be hereunto affixed and these presents to be signed by its Vice President and Secretary, and the said lessee has caused its corporate seal to be hereunto affixed, and these presents to be signed by its Vice President and Secretary the day and year first herein written in duplicate.

(Signed) JAMES W. ALEXANDER,
Vice President.

[SEAL] (Signed) W. ALEXANDER,
Secretary.

(Signed) PASCHALL CARR,
Vice President.

[SEAL] (Signed) J. S. KENDRICK,
Secretary.

[REFERRING TO PAGE 38]

I wish to correct an error in this preliminary report. In the discussion of the syndicate transactions the report says, "All these gentlemen (including Mr. Alvin W. Krech, President of the Equitable Trust Company) who divided these profits were directors of the Society and six of them members of the Executive and Finance Committees." Mr. McIntyre, testifying as to the particular syndicates in which Mr. Krech participated, said, "The two men in that list, Mr. McIntyre and Mr. Krech, were not members of either the Executive or Finance Committees."

Furthermore, in the letter from Mr. Hyde to Mr. Frick, a copy of which was served on me, red stars appear before the names of Mr. McIntyre and Mr. Krech, calling special attention to the following footnote: "(Not member of Executive or Finance Committees)". Mr. McIntyre was a director of the Society and the inference was drawn by the Frick Committee, as well as myself, that Mr. Krech was also. However, since the publication of the report, I have received the certificate of Mr. Hyde that these syndicate transactions were closed on July 13, 1904, and the certificate of William Alexander, Secretary of the Society, that Mr. Krech was first elected a director on August 3, 1904. It follows, therefore, that his participations in the syndicate transactions were terminated twenty-one days before he became a director.

I am pleased to make this correction.

FRANCIS HENDRICKS,

Superintendent of Insurance.

Dated ALBANY, *June* 26, 1905.

UNITED STATES CIRCUIT COURT OF APPEALS 298

FOR THE SECOND CIRCUIT.

No. 66.—October Term, 1906. Argued January 17, 1907. Decided February 7, 1907.

J. WILLCOX BROWN,
Complainant-Appellant,

AGAINST

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant-Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York. 299

Before Judges Lacombe, Townsend and Coxe.

Per Curiam.—This cause comes here by appeal from order and decree of the United States Circuit Court for the Southern District of New York sustaining demurrer to and dismissing amended bill. The bill, brought by a policyholder on behalf of himself, and all other policyholders of defendant and its annuitants, alleges the incorporation of defendant as an insurance company under a charter 300
and declaration which provides that its cash capital stock shall be one hundred thousand dollars, divided into shares of the par value of one hundred dollars each, on which its stockholders are entitled to receive semi-annual dividends not exceeding three and one-half per cent. The bill further alleges that the defendant's net earnings are to be accumulated, that it is to be conducted on the mutual plan and that the surplus as ascertained upon a balance struck by its officers is to be equitably credited or applied for the benefit of the policyholders.

301 The bill further alleges that the complainant has elected to receive his equitable share of said surplus; that the amounts apportioned and allowed to him by the defendant are not the real amounts of his equitable share in the true surplus, but that by reason of abuse of discretion, wrongs and inequitable conduct of its officers and agents, the defendant and its officers and stockholders have wrongfully retained, and fraudulently wasted and misappropriated to themselves a large portion of the surplus of the defendant belonging to the policyholders, and that certain of said stockholders in a pending suit have asserted the stockholders' ownership of and right to the whole or a portion of said surplus
302 as against said policyholders. The report of the Investigating Committee of the Board of Directors, commonly known as the Frick Report, and the report of the Superintendent of Insurance of the State of New York, of June 21, 1905, are made a part of the bill and it is averred that the statements therein contained are true.

The bill further avers that complainant has no adequate remedy at law, and prays for equitable relief.

The defendant assigns various grounds in support of its demurrer which may be summarized under the claim that the bill fails to state a cause of action, and it relies upon various decisions of the
303 courts of the State of New York, and of the Federal courts where it is claimed that upon a similar state of facts said courts have held that a policyholder had no right to such equitable relief.

An examination of the authorities which are material to this discussion shows that upon whatever other grounds the courts may have reached conclusions adverse to the rights of policyholders, yet in none of said cases in the Federal courts or in the court of last resort of the State of New York, have there been definite, specific allegations of facts charging bad faith, wilful neglect, abuse of discre-

tion, fraud or misappropriation by the defendant. 304
A single citation from the opinion of the Court in *Uhlmann* v. *New York L. I. Co.* (109 N. Y., 421), will serve to illustrate the principle which appears to be applicable generally to the cases cited by defendant where these questions have been considered.

In the Uhlmann case, Judge, now Mr. Justice, Peckham, delivering the opinion of the Court, says as follows:

> " We do not, however, accede to the claim of the defendant herein to its full extent as made in the brief submitted, which is, that the apportionment, as made by the defendant, is absolutely and at all events, conclusive 305
> upon the policyholders. We hold that, under the terms of this policy, the apportionment was to be equitably made, and, in the first instance, by the defendant's officers or agents. But, inasmuch as the agreement is that the apportionment shall be an equitable one, the question of what is an equitable one, all the facts and circumstances being known, may be one over which the courts have supervision. *Prima facie*, the apportionment as made by the defendant should be regarded as a compliance with the terms of the policy, or, in other words, should be regarded as an equitable apportionment. It should be thus regarded, because by the terms of the policy the duty of making it is cast upon the corporation, and it ought to be pre-
> sumed that the defendant has performed its 306
> duty instead of presuming that it has failed to do so. But the question is still left, has or has it not complied with its agreement to make an equitable apportionment? And the plaintiff, and all others similarly situated, have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial and make proof of such allegations, and, if proved, the court will declare the proper principles upon which the apportionment is

307 to be made, so as to become an equitable apportionment. The various cases cited in the briefs submitted, where the Legislature has appointed parties to apportion stock in a bank created by its laws, &c., and where the courts have held that the apportionment by the board thus created was final, do not, we think, conclude us here. The principles are entirely different. But as the plaintiff herein has made no proof of any misappropriation or wrongdoing, we are of the opinion that, upon the first question argued, he has failed to show any right to an accounting by the defendant."

To the same effect are the decisions in *Fuller* v. *Metropolitan Life Ins. Co.* (37 Fed. Rep., 163);
308 *Pierce* v. *Equitable Life Assurance Co.* (145 Mass., 56); *Everson* v. *Equitable Life Assurance Co.* (68 Fed. Rep., 258); *Greeff* v. *Equitable Life Assurance Co.* (160 N. Y., 19); *Fuller* v. *Knapp* (24 Fed. Rep., 100).

In the Greeff case, *supra*, which was an action at law, the Court held that if the action were to be regarded as one for an accounting, it was prohibited by Section 56, Chapter 690, of the Laws of 1892 of the State of New York.

Inasmuch as counsel for defendant state in their brief that "this statutory provision has been repealed since the decision was rendered" below, and have neither discussed the point in their brief nor
309 in the oral argument, the statute cannot now be regarded as a bar to this suit.

In the case at bar the precise situation is presented which was foreshadowed in the opinions referred to above, and thereby this case is differentiated from the preceding cases. Here the reports referred to and made a part of the bill are replete with specific circumstantial allegations of the precise facts constituting the fraud, waste and mismanagement complained of, in connection with a detailed showing either of direct loss of funds, or of illegal and unauthorized diversion and misappropri-

ation of a considerable share of profits belonging to 310
defendant, and of further waste and mismanagement by the payment of salaries originally excessive and unwarrantably increased, and of improper investments of and failures to invest the funds of defendant, particularly set forth in detail, all resulting in perpetration of wrongs on the policyholders through violation of defendant's obligations to them.

In these circumstances, and without passing upon any of the other questions presented as to the respective rights and obligations of the parties, we conclude that upon the facts alleged in the bill, and, for the single purpose of testing its efficiency, admitted by the demurrer, complainant has a right to appeal to a court of equity for relief, and that the 311
defendant is bound to answer the allegations of the bill.

The order sustaining the demurrer and the decree dismissing the bill are reversed, with costs, and the cause is remanded to the Court below with leave to the defendant, if it shall be so advised, to answer over within such time as the Circuit Court shall decree.

H. S. Marshall, for the Appellant.
Allan McCulloh, for the Appellee.

312

313 UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 66.—October Term, 1906. Argued January 17, 1907. Decided February 7, 1907.

J. WILLCOX BROWN,
Complainant-Appellant,

AGAINST

314

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant-Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Judges Lacombe, Townsend and Coxe.

LACOMBE, *Circuit Judge:* In recording concurrence with the conclusion of the majority of the Court, I am not to be understood as expressing or intimating an opinion upon any of the questions raised and argued upon the appeal, except the single one that because the bill contains express and specific charges of fraud the case is brought within
315 the class pointed out in the Uhlmann case and cannot be thrown out upon a general demurrer as not stating facts sufficient to constitute a cause of action.

At a Stated Term of the United States 316
Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building, in the City of New York, on the 17th day of February, one thousand nine hundred and seven.

Present—Hon. E. HENRY LACOMBE,
Hon. WILLIAM K. TOWNSEND,
Hon. ALFRED C. COXE,
} *Circuit Judges.*

317

J. WILLCOX BROWN,
Complainant-Appellant,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant-Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York. 318

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said

319 Circuit Court be and it hereby is reversed, with costs, and cause remanded to the Court below, with leave to the defendant, if it shall be so advised, to answer over within such time as the Circuit Court shall decree.

E. H. L.:

It is further ordered that a mandate issue to the said Circuit Court in accordance with this decree.

320

321

UNITED STATES CIRCUIT COURT OF APPEALS 322

FOR THE SECOND CIRCUIT.

J. WILLCOX BROWN, on behalf of himself and others, &c., Appellant,

AGAINST

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appellee.

IN EQUITY. 323

TO THE HONORABLE THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

The petition of the Equitable Life Assurance Society of the United States, defendant-appellee, respectfully shows to this Court as follows:

This cause was argued in this Court before Judges Lacombe, Townsend and Coxe on the 17th and 18th days of January, 1907, on an appeal by the complainant from a decree of the Circuit Court 324 of the United States for the Southern District of New York, sustaining a demurrer to the bill of complaint herein and dismissing the said bill. A decision was handed down by this Court on or about the 7th day of February, 1907, reversing said decree and remanding the cause to the Court below, with leave to the defendant, if it shall be so advised, to answer over within such time as the Circuit Court shall decree. This decision was made at the present term of court. No order or decree has been entered as yet in the Circuit Court of the United States for the

325 Southern District of New York upon the mandate of this Court.

Your petitioner now comes and respectfully represents to this Court that there should be a rehearing granted on the said appeal for the reason that this Court has overlooked certain considerations, which in the opinion of your petitioner are controlling, and which should have led the Court to affirm the said decree. The propositions which your petitioner respectfully submits have been so overlooked are set forth in the memorandum hereto annexed, entitled "Points for Appellee upon motion for reargument."

326 Wherefore, your petitioner prays that this Court grant a rehearing and reargument of the various questions of law involved in the appeal aforesaid, or for such other and further relief in the premises as to the Court may seem just.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES.
By ALEXANDER & GREEN,
its Solicitors.

WILLIAM B. HORNBLOWER and ALLAN MCCULLOH certify that they are of counsel for the Equitable
327 Life Assurance Society of the United States, petitioner-appellee in the above entitled cause; that in their opinion the above petition is well founded in point of law and it is deserving of judicial consideration, and that the same is not interposed for delay.

Dated March 6th, 1907.

WILLIAM B. HORNBLOWER,
ALLAN MCCULLOH,
Of Counsel.

UNITED STATES CIRCUIT COURT OF APPEALS, 328

SECOND CIRCUIT.

BROWN

vs.

EQUITABLE.

Motion for reargument denied. 329

(Endorsed)—Brown *vs.* Equitable.—Decision.—United States Circuit Court of Appeals, Second Circuit.—Filed Mar. 14, 1907.—William Parkin, Clerk.

330

331 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held at the Court Rooms in the Post Office Building, City of New York, on the 25th day of March, 1907.

Present—Hon. E. HENRY LACOMBE, WILLIAM K. TOWNSEND, ALFRED C. COXE, *Circuit Judges.*

J. WILLCOX BROWN,
Complainant-Appellant,

332 vs.

EQUITABLE LIFE ASSURANCE SOCIETY,
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered, that said petition be and hereby is denied.

E. H. L.

(Endorsed)—United States Circuit Court of Appeals,
333 Second Circuit.—J. W. Brown *vs.* Equitable Life Assurance Society.—Order.—United States Circuit Court of Appeals, Second Circuit.—Filed Mar. 25, 1907.—William Parkin, Clerk.

334

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 112 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of J. Willcox Brown against Equitable Life Assurance Society of the United States, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, 335
in the Second Circuit, this 20th day of April, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the said United States the one hundred and thirty-first.

WM. PARKIN,
Clerk.

[SEAL.]

336

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which J. Willcox Brown is appellant, and The Equitable Life Assurance Society of the United States is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of December, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 20,692. Supreme Court of the United States. No. 300, October Term, 1907. The Equitable Life Assurance Society of the U. S. *vs.* J. Willcox Brown. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 14, 1907. William Parkin, Clerk.

Supreme Court of the United States.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appellant,
against
J. WILLCOX BROWN, Appellee.

It is hereby stipulated and consented that the certified transcript of record on file in the Supreme Court of the United States be and the same hereby is taken as the return on the writ of certiorari heretofore issued herein by the Supreme Court of the United States

to the United States Circuit Court of Appeals for the Second Circuit on the 11th day of December, 1907.

Dated New York, December 13, 1907.

ALLAN McCULLOH,
Counsel for Appellant.
JOHN R. DOS PASSOS,
Counsel for Appellee.

Endorsed: Equitable Life Society *vs.* Brown. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 14, 1907. William Parkin, Clerk.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, December 14, 1907.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] 300, 20,692. United States Circuit Court of Appeals, Second Circuit. J. Willcox Brown *vs.* Equitable Life Assurance Society. Return to Certiorari.

[Endorsed:] File No. 20,692. Supreme Court U. S., October Term, 1907. Term No. 300. The Equitable Life Assurance Society of the U. S., Petitioner, *vs.* J. Willcox Brown. Writ of Certiorari and return. Filed Dec. 17th, 1907.

In the Supreme Court of the United States. 1

Ex parte THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner.

SIRS:

Please take notice that the annexed petition for a writ of *certiorari*, directed to the Circuit Court of Appeals for the Second Circuit, requiring it to certify to the Supreme Court of the United States for 2
a review and determination by the Supreme Court, the suit of J. Willcox Brown, a citizen of the State of Maryland, for himself as well as on behalf of all other policyholders and annuitants of the Equitable Life Assurance Society of the United States who may choose to come in and join in said suit, complainant, against The Equitable Life Assurance Society of the United States, defendant, will be presented to the Supreme Court of the United States on the 13th day of May, 1907, at twelve o'clock noon, or as soon thereafter as counsel can be heard.

Dated at the City of New York, April 29th, 1907.

WILLIAM B. HORNBLOWER,
ALLAN MCCULLOH,
Of Counsel for Petitioner. 3
Office and Post Office address,
Care of Hornblower, Miller & Potter,
No. 24 Broad street,
New York City, N. Y.

To JOHN R. DOS PASSOS, Esq.,
Counsel for Respondent.
Office and Post Office address,
No. 20 Broad Street,
New York City, N. Y.

*

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1906.

Ex parte THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner.

The petition of The Equitable Life Assurance Society of the United States for a writ of *certiorari* requiring the Circuit Court of Appeals for the Second Circuit to certify to the Supreme Court of the United States for a review and determination by the Supreme Court, the suit of J. Willcox Brown, a citizen of the State of Maryland, brought on behalf of himself, as well as on behalf of all other policyholders and annuitants of The Equitable Life Assurance Society of the United States who might come in and join in said suit, complainant, against The Equitable Life Assurance Society of the United States, defendant, respectfully shows to this Honorable Court as follows:

I.—Your petitioner is a corporation duly organized and existing under the laws of the State of New York, and was at the time of the commencement of the said suit and still is a citizen and resident of that State.

II.—The complainant was at the commencement of said suit and still is a citizen and resident of the State of Maryland.

III.—The said suit was brought in the Circuit Court of the United States for the Southern District of New York, on the equity side of the Court, by the filing of a bill of complaint on the 24th

day of April, 1905. Subsequently, and or or about 7
the 28th day of July, 1905, an amended and supplemental bill of complaint was filed, to which amended and supplemental bill of complaint a demurrer was interposed on behalf of the defendant, The Equitable Life Assurance Society of the United States; and thereafter the cause coming on to be heard upon said amended and supplemental bill and upon the said demurrer of the defendant to the same before Judge John R. Hazel, sitting in the said United States Circuit Court for the Southern District of New York, and the said cause having been argued before the said Judge, and consideration thereof having been had, the said Judge subsequently and on or about the 8th day of January, 8
1906, filed an opinion sustaining the demurrer with costs, and dismissing the bill; and thereafter and on the 18th day of January, 1906, an order was duly entered sustaining said demurrer and dismissing the said amended and supplemental bill; and thereafter and on the 27th day of January, 1906, a decree was duly entered in said Circuit Court of the United States for the Southern District of New York, adjudging and decreeing that the demurrer to the amended and supplemental bill of complaint be sustained and the said amended and supplemental bill of complaint be dismissed. Thereafter an appeal was taken on behalf of the complainant from the said decree to the United States Circuit Court of 9
Appeals for the Second Circuit, and said appeal came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit on the 17th and 18th days of January, 1907, before Judges Lacombe, Townsend and Coxe, and after argument decision was reserved. Thereafter and on the 7th day of February, 1907, a decision was handed down reversing said decree and remanding the cause to the Court below, with leave to the defendant, if it shall be so advised, to answer over within such time as the Circuit Court shall decree. Thereafter an applica-

10 tion for reargument was presented to said Court, which application was denied; and thereafter and on or about the 26th day of March, 1907, a decree was entered in the Circuit Court for the Southern District of New York, in conformity with the decision of said Circuit Court of Appeals.

IV.—This suit is brought by the complainant as a policyholder of the defendant Society on behalf of himself and all other policyholders and annuitants of said Society who may choose to come in and join in this suit, and during the pendency of the suit the following policyholders have intervened and become parties, namely: T. Ashby Blythe, Edward E.
11 Montgomery, Howard B. Arrison, Joseph H Parvin, Sheldon Jackson, C. R. Kline, George F. Hoffman, Edward W. Parker, Philip C. Warman, William Taylor Thorne, N. H. Darton, Frederick Haynes Newell, Cassius Asa Fisher, Harry B. French, Arthur P. Davis, Daniel H. Carstairs, John Hazeltine Carstairs, Benjamin Delheim, Julian B. Hart, Charles S. Davis, Horatio G. Gibson, Thomas L. Waters, Oscar A. Danbe, John S. Williams, Henry S. Black and John G. Farley.

V.—This defendant was incorporated in the year 1859 under the provisions of the general laws of the State of New York in force at that time, entitled
12 "An act to Provide for the Incorporation of Life and Health Insurance Companies and in Relation to Agencies of such Companies," passed June 24, 1853, and amendments thereto. The charter of the defendant Society, adopted in accordance with the provisions of the said laws of the State of New York, appears as Exhibit A, annexed to the amended and supplemental bill of complaint herein, being part of the declaration or articles of association, subscribed by the incorporators on the 2d day of May, 1859, and duly filed in accordance with said laws of the State of New York.

VI.—Said defendant Society has been engaged in 13
the business of insuring lives and granting annuities continuously from the date of its organization up to the present time, and is still engaged in said business and is now subject to the general insurance laws of the State of New York as embodied in the so-called "Insurance Law," Chapter 690, Laws 1892, passed by the Legislature of the State of New York and approved on the 18th day of May, 1892, and subsequently amended from time to time and as recently amended by Chapter 326 of the Laws of 1906, to all of which statutes reference is hereby made for more definite information as to the powers and duties of said Society.

14

VII.—It appears by the said amended and supplemental bill of complaint that the complainant claims to be the owner and holder of a policy of insurance, issued by the defendant Society, to wit, Policy No. 27,175, insuring his life in the sum of $25,000, a copy of which policy is attached to the said amended and supplemental bill of complaint and marked Exhibit B, and that in said policy it was provided:

> "6. This policy during its continuance shall be entitled to participate in the distribution of the surplus of this Society by way of increase to the amount insured, according to such principles and methods as may from time to time be adopted by this Society for such distribution, which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract, but the Society may at any time before a forfeiture, upon the request of the person holding the absolute legal title to this policy, substitute a cash payment to be fixed by said Society in lieu of the said increase to the amount insured and such payment may be made by reduction of subsequent premiums if said policyholder shall so elect."

15

Said amended and supplemental bill of complaint proceeds to make various allegations as to the con-

duct of the defendant, its officers and agents, and as to the condition and situation of the defendant Society, and prays, among other things, for an accounting of all dealings and transactions of the defendant Society, its officers, agents and stockholders, in and about its surplus and assurance funds from the commencement of the business of the Society, or for such other period as the Court deems proper, and that a trust be adjudged and declared to exist and be imposed upon the said assurance funds and surplus, as ascertained and as alleged in the bill, in favor of the policyholders, past and present, of such Society, and against the Society, its officers and stockholders, and that it be adjudged that they and each of them hold the same as trustees for such persons as shall be declared to have an interest therein under the decree to be entered in this cause, and that it be adjudged that complainant and the policyholders and annuitants, and all former policyholders or their representatives be credited with the full, proper and equitable share of the surplus and assurance funds ascertained upon said accounting and such amounts as may be found to be due and payable be adjudged to be paid forthwith, and it is further prayed in said bill that an accounting be had

> " of all dealings and transactions of the defendant Society, its officers, agents and stockholders, in and about the funds received and held by the Society, realized from the premiums paid by policy-holders and annuitants, and the accretions thereof, and that on the taking of said account it be ascertained to what extent the said defendant Society is indebted to the said fund so derived as aforesaid, on account of damages, losses aud depletions occasioned by its negligence, misconduct, misappropriations and other causes averred,"

in the supplemental and amended bill, and that it be adjudged that the defendant Society pay into said assurance fund the amount ascertained on said

accounting to be due from said defendant Society 19
to said fund. The said amended and supplemental bill of complaint also prayed for an injunction and for the appointment of a receiver or receivers—

> "to take possession of all the funds, assets and property held by the defendant Society of every character and description, and administer the same as they may be directed by the Court."

VIII.—Your petitioner respectfully represents to this Court that the questions raised by the demurrer to the said amended and supplemental bill of complaint are of the utmost importance to the defendant Society and its policy-holders, of whom there are 20
upwards of 500,000 resident throughout the United States and in foreign countries, and that if said demurrer is well taken, as was held by the Circuit Court, it will be a great hardship and injustice to the defendant Society and its said policy-holders and an irreparable injury to them if the defendant Society shall be required to answer over to the said amended and supplemental bill of complaint and to proceed with the trial of this cause upon the issues of fact that may be raised by such answer. That such trial, as appears by the prayer of the amended and supplemental bill of complaint, will involve an examination into the affairs of this company during its entire history, covering
a period of more than forty-five years, at the close 21
of which period the amount of outstanding insurance written by your petitioner, as appears from the amended and supplemental bill of complaint, on December 31, 1904, was $1,495,542,892.; its gross assets being $413,953,021., which included a so-called surplus over all insurance liabilities of $80,794,269. It will also involve an examination into the individual conduct of the officers and directors of the Society for a period of years covered by the specific allegations made in the said amended and supplemental bill of complaint, notwithstanding that all

of such matters have been heretofore fully inquired into and investigated, as appears by the said bill of complaint itself, by a Committee of the Board of Directors of the said Society and by the Superintendent of Insurance of the State of the New York, as well as by a joint committee of the Senate and Assembly of the State of New York, appointed under a joint resolution of the Legislature in 1905, which Committee reported to the Legislature in 1906 (see Chap. 2 of Laws of 1906), and said accounting will involve an expense to the defendant Society, and its policyholders, of at least $500,000, exclusive of the costs and fees of counsel in the suit; all of which will be a useless and unnecessary burden upon the said defendant Society and its policyholders if it should be ultimately held that said demurrer was well taken and that said bill of complaint should have been dismissed; the amount of the expenses of the accounting, as above stated, being based upon the actual expenses of an examination and audit of the accounts of said Society which has been made under the direction of the present management of said Society by independent expert public accountants since the commencement of this suit.

So far as the said accounting is sought for the purpose of ascertaining the amounts wasted by reason of the alleged frauds and mismanagement of the former officers and directors of the Society, the said accounting will be utterly useless for all practical purposes, since, first, no decree can be made in this suit requiring the Society to apportion among the policyholders the amount so wasted, such amount no longer being actually in the treasury of the Society and the present directors and officers having no power to apportion or distribute among the policyholders moneys not actually in the treasury of the Society, or assets not actually in the possession of and under the control of the Society, its officers and directors; secondly, because the former officers and directors of the Society are not made parties defend-

ant to this suit and consequently no decree for reimbursement can be made herein; thirdly, because a suit is now pending in the Supreme Court of the State of New York on behalf of the People of the State, brought by the Attorney-General of the State under the provisions of the Code of Civil Procedure of the State of New York against the former officers and directors of the Society for an accounting for the alleged acts of fraud, waste and mismanagement and to require reimbursement to the Society of the funds alleged to have been wrongfully diverted therefrom, as will more fully appear by reference to the suit as reported under the name of *People against Equitable Life Assurance Society*, 51 N. Y. Miscellaneous Rep., 339. 25 26

IX.—Your petitioner is advised by counsel, and verily believes, that under the laws of the United States suits in equity can only be maintained where relief of an equitable nature is sought, as for instance, relief by way of reformation, rescission or the specific performance of contracts, or involving the administration of trusts and dealings with trust funds. Your petitioner is also advised by counsel, and verily believes, that in said suit against your petitioner, there exists, under the authorities, no ground of equitable jurisdiction. That the decision of the said United States Circuit Court of Appeals for the Second Circuit in effect holds that there is equitable jurisdiction in said Circuit Court of the United States, which decision, if based upon the theory that a trust relation exists, as claimed by complainant, is in conflict with decisions heretofore rendered in the United States Circuit Court of Appeals for the Third Circuit, and also in conflict with the decisions of the Court of Appeals of the State of New York, as well as in conflict with decisions in other cases which will be cited upon the brief hereto annexed to which reference is hereby made for a fuller and more complete statement of the reasons for granting the writ of *certiorari*. Your petitioner 27

* *

is further advised by counsel, and verily believes, that it appears from the opinion of the said United States Circuit Court of Appeals for the Second Circuit that the decree sustaining the demurrer was reversed mainly upon the theory that the allegations of fraud and misconduct on the part of the former officers and the directors of the Society contained in the amended and supplemental bill of complaint gave the United States Circuit Court jurisdiction of the suit. That said decision of said United States Circuit Court of Appeals, so far as it holds that jurisdiction in equity may be based solely upon the ground of fraud, is in conflict with the decisions of this Court. The brief hereto annexed contains further reasons why the said decision of the United States Circuit Court of Appeals is erroneous and should be reviewed by this Court.

X.—Your petitioner further respectfully represents that the present suit is one in which this Honorable Court may properly issue a writ of *certiorari* for the following reasons, among others:

1. Because of the public interests and the interests of the numerous policyholders of your petitioner in the subject-matter of the suit and the importance of the questions of law involved therein respecting the relations between your petitioner and its policyholders.

2. Because the questions of law involved in said suit have never been specifically passed upon and determined by this Court, although your petitioner claims that the principles of law on which this suit should be decided have been laid down by this Court adversely to the rulings of the United States Circuit Court of Appeals.

3. Because there is a conflict between the decision of the United States Circuit Court of Appeals for the Second Circuit in this suit and the decisions of the

Circuit Court of Appeals for the Third Circuit, and 31
the Court of Appeals of the State of New York, as to the law respecting the relations existing between your petitioner and its policyholders.

4. Because your petitioner is not entitled to prosecute an appeal to this Honorable Court or to a writ of error from this Honorable Court to review the judgment of the said United States Circuit Court of Appeals for the Second Circuit, and that your petitioner can only obtain a review of the decision of said Court by means of a writ of *certiorari* to be issued by this Honorable Court requiring the said United States Circuit Court of Appeals to certify this suit for review. 32

XI.—Your petitioner therefore respectfully represents that this Court should, in the interests of justice and to prevent a miscarriage of justice and to obviate the necessity of a long and expensive trial, which may be ultimately determined to be unnecessary, grant it a writ of *certiorari* at this stage of the case to review the questions of law raised by the demurrer, and to determine whether in the opinion of this Court the said amended and supplemental bill is sustainable, and whether the said defendant Society should be required to answer over and to go to trial upon the allegations of said bill. 33

XII.—Your petitioner annexes hereto a brief in support of this application, and respectfully submits that for the reasons therein stated the decision of the Circuit Court of Appeals is erroneous and the decision of the Circuit Court for the Southern District of New York is correct.

XIII.—A certified copy of the entire record of the case in the Circuit Court of Appeals is herewith furnished and made a part of this petition and application as if hereto annexed, all in conformity with Rule

37 of this Honorable Court relative to cases from Circuit Courts of Appeal.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court on a day certain to be therein designated, the full, true and complete transcript of record and of all proceedings of said Circuit Court of Appeals in said suit therein entitled, "J. Willcox Brown, a citizen of the State of Maryland, for himself as well as on behalf of all other policy-holders and annuitants of the Equitable Life Assurance Society of the United States, who may choose to come in and join in said suit, complainant, and the Equitable Life Assurance Society of the United States, defendant"; to the end that said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress, entitled, "An Act to establish Circuit Courts of Appeal and to Define and to Regulate, in certain cases, the jurisdiction of the Courts of the United States, and for other purposes;" approved March 3, 1891.

And that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper and in conformity with said Act, and that the said decision of the said United States Circuit Court of Appeals for the Second Circuit in said suit, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
by WILLIAM B. HORNBLOWER,
ALLAN MCCULLOH,
Of Counsel.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.: 37

PAUL MORTON, being first duly sworn, deposes and says that he is an officer, to wit, the president of the Equitable Life Assurance Society of the United States, the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

PAUL MORTON.

Subscribed and sworn to before me this 29th day of April, 1907.

JOHN B. RUSSELL,
[SEAL.] Notary Public, 38
New York County.

39

In the Supreme Court of the United States.

Ex parte THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner.

BRIEF FOR PETITIONER ON APPLICATION FOR THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement.

This is an application by the petitioner, The Equitable Life Assurance Society of the United States, for the issuance of a writ of *certiorari* by this Court to the United States Circuit Court of Appeals for the Second Circuit, requiring it to certify to this Court for review and determination a suit in equity brought by J. Willcox Brown, a citizen of the State of Maryland, for himself as well as on behalf of all other policyholders and annuitants in The Equitable Life Assurance Society of the United States who may choose to come in and join in said suit, complainant, against the petitioner herein, as defendant.

The suit was commenced by the filing of a bill of complaint and the issuance of a subpœna in said suit on the 24th day of April, 1905. Thereafter and

on the 28th day of July, 1905, a supplementary and amended bill of complaint was filed by the complainant in said suit, the only parties named in said bill being the said complainant and this petitioner. Since the commencement of the suit, however, certain policyholders have filed intervening petitions in said suit, praying to be made parties complainant therein.

The relief which plaintiff seeks (fols. 95–101) is as follows:

FIRST.—A discovery.

SECOND.—An accounting "of all dealings and transactions of the defendant Society, its officers, agents and stockholders, in and about said surplus and assurance funds, from the commencement of the business of the Society, or for such other period as the Court deems proper."

THIRD.—That it be adjudged that the Society holds its funds and surplus in trust for its "policyholders past and present," and that such a trust may be imposed upon such funds and surplus as "against the said Society, its officers and stockholders."

FOURTH.—A judgment that the Society and other policyholders and "former policyholders be credited with a full, proper and equitable share" of such funds and surplus "as properly ascertained upon said accounting, and that such amounts thereof as may be found to be due and payable be adjudged to be paid forthwith."

FIFTH.—An accounting of all dealings and transactions of the defendant Society, its officers, agents and stockholders with regard to all premiums received by it "and the accretions thereof," and that "it be ascertaincd to what extent the said defendant Society is indebted to the said fund so derived

as aforesaid on account of damages, losses and depletions * * *"

SIXTH.—That the Society pay into such fund the amount thus ascertained to be due to it.

SEVENTH.—That the Society, its directors, officers and agents, be enjoined from doing any act in connection with the funds of the Society, except to transfer them to a receiver to be appointed by the Court.

EIGHTH.—That a receiver be appointed to take and administer all of the Society's "funds, assets and property."

NINTH.—General relief.

The principal allegations contained in the said supplemental and amended bill are as follows:

The defendant was organized in 1859 under the General Life Insurance Law of New York, which was adopted June 24, 1853 (fols. 4–5). The charter of the defendant is set forth in full as Exhibit A, annexed to the bill, and portions of it are also quoted at length at folios 5–15 of the bill. It appears from the charter that the defendant is a stock corporation having a capital stock of $100,000, divided into 1,000 shares of the par value of $100 each (fols. 5, 6). The corporate powers of the company are vested in a Board of Directors, consisting of fifty-two persons (fols. 6, 7), elected by the stockholders (fol. 8). The charter limits dividends payable to the stockholders to three and one-half per cent. upon their stock semi-annually, and provides that the earnings in excess of this amount "shall be accumulated" (fol. 6). It further provides that "the insurance business of the company shall be conducted upon the mutual plan" (fol. 11); that a balance of the affairs of the company shall

from time to time be struck and the net surplus ascertained and each policyholder credited "with an equitable share of the said surplus," which equitable share may be applied to reduce subsequent premiums, or in various other manners (fols. 12, 13).

It appears that complainant originally took out a policy in the year 1867 (fol. 19), but that he subsequently made "a new arrangement," whereupon was issued January 12, 1876 (fol. 130), the policy upon which present suit is brought (fol. 21). This policy is annexed to the bill as Exhibit B (p. 42). Under its terms, which are not set forth with entire accuracy in the body of the bill, the Society agreed, in consideration of the payment of an annual premium, upon the death of the complainant during the continuance of the contract, to pay the sum of $25,000 "to Turner M. Brown, wife of J. Willcox Brown, for her sole use, if living, in conformity with the statute, and if not living, to the children of said J. Willcox Brown, or their guardian, for their use; or if there be no such children surviving, then to the executors, administrators or assigns of said J. Willcox Brown" (fols. 126, 127). The bill at folios 22 and 23 quotes in full all the provisions of the policy giving a right to participate in the distribution of surplus. The contract provides (fol. 140) that the policy shall be entitled to participate in such distribution "according to such principles and methods as may from time to time be adopted by this Society for such distribution, which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract, but the Society may, at any time, before forfeiture, upon the request of the person holding the absolute legal title to this policy, substitute a cash payment, to be fixed by said Society, in lieu of the said increase to the amount insured, and such payment may be made by reduction of subsequent premiums, if said policyholders shall so elect."

The bill then alleges that there was such an election to receive payments in reduction of premiums; that premiums have been paid regularly since the policy was taken out; that sums have been annually apportioned to the policy, but that such sums "have not been the real amounts of your orator's equitable share in the true surplus" (fols. 23-26). The bill alleges that while a balance has annually been struck of the affairs of the Society (fol. 27), the Society has regularly only credited and paid to its policyholders a portion of its surplus "to the whole amount of which your orator and the said policyholders were entitled in equitable proportion" (fols. 29, 30), and that the defendant has "retained a large portion of the said surplus in their possession uncredited and undivided, to all of which said surplus the policyholders, past and present, and your orator * * * have been and are now entitled to either credit or payment in equitable proportion" (fol. 31). It is also alleged that the stockholders claim the amount of the surplus as a dividend or earning upon the shares of stock of the Society (fol. 31). The bill then sets forth a table showing, for each year since the Society's foundation, the amount of its outstanding assurance, its assets, its liabilities and surplus (fols. 32-39), and alleges that the retention of its ascertained surplus was contrary to law and "was not necessary for a prudent management of the Society's affairs" (fol. 40), and constituted an unlawful abuse of the discretion vested in the directors of the Society as to the management of its affairs, and a fraud upon complainant's rights and the rights of said policyholders (fol. 41).

These allegations raise the precise question which was raised and disposed of in the case of *Greeff* vs. *Equitable Life Assurance Society*, 160 N. Y., 18, in which case it was held that the directors were not obliged to distribute the entire net surplus of the Society among the policyholders.

At folios 48-50 the bill sets forth a list of the directors of the Society in January, 1905, and alleges

that a majority of them are not proprietors of five shares each of the capital stock of the Society, as required by its charter.

Proceeding, the bill purports to give the history of a dissension in the Board of Directors over the policy and management of the defendant; and of the investigation of its affairs by a committee of the Board of Directors, and by the Superintendent of Insurance of the State of New York; and alleges that the investigating committee and the Superintendent of Insurance each made a report, which reports complainant avers to be true, and annexes to his bill as Exhibits C and D (fols. 50–57). The bill then sets forth various alleged acts of waste and mismanagement upon the part of the officers and directors of the Society (fols. 57–61); and alleges that a large number of the directors have resigned (fols. 61, 62); that the control of the stock of the Society has changed hands and is now vested in certain trustees, and that new directors have been elected to take the place of those resigning (fols. 62–65). Such new directors are alleged not to be stockholders (fol. 65).

It is because of these specific charges of fraud and mismanagement on the part of the former officers and directors of the Society that the Circuit Court of Appeals overruled the demurrer and sustained the bill. It is to be observed, however, that these frauds are *not* frauds upon the *policyholders* in the matter of the apportionment of dividends, but are *frauds upon the Society* itself, by reason of which the Society has been deprived of a portion of its assets. The bill, so far as it is based upon these allegations of fraud, in effect prays that the Society be required to account to the plaintiff for *assets which it does not now possess*, and which it cannot recover except by suit against the former officers and directors who are not made parties defendant to this suit.

At folio 67 complainant further asserts that he has no adequate remedy at law "to secure proper

protection and care of the said assurance funds and surplus now under the control of the said Society." He alleges that the business is very large (fols. 69, 70); that the assurance funds have been and are being wasted and mismanaged, and that the Society is without a legally chosen Board of Directors (fol. 71). He also alleges that there exists public distrust of the management (fol. 72), that the Society is continuing to do business (fols. 74, 75); that "there is no reason why any effort should be made, so far as the interests of the present policyholders and annuitants are concerned, to obtain any new business for the defendant Society" (fol. 77); that, as a majority of the Board of Directors are not stockholders, "the defendant is now incapacitated from further conducting its business according to law" (fols. 81–84), that an accounting is necessary to ascertain the amount of waste of the Society's funds, and that the Society is liable to repay "to the said assurance funds" all amounts wasted and misappropriated (fols. 84, 85). It is then averred that the defendant is unable to repay such sums and "is wholly insolvent in consequence thereof" (fol. 86). The bill further avers that there are above 500,000 policyholders and annuitants, that relief could not be given in an action at law (fols. 86–88) and that a discovery is necessary (fols. 88–89). The bill also avers that the rules and regulations adopted by the Society with reference to the disposition of its surplus are inconsistent with its charter and contrary to the laws of this State (fol. 89); and repeats the averment that the Society is insolvent because it is unable to pay back (to itself!) funds misappropriated by its officers (fol. 90). The bill concludes with an averment that the matter in dispute exceeds the jurisdictional amount (fol. 92), and prays for the relief which we have summarized at the beginning of this statement.

The defendant demurred to the amended and supplemental bill of complaint, for want of equity, and

on the ground that complainant has an adequate remedy at law; that there is a want of proper parties defendant, and that complainant's said bill is multifarious, in that there are joined therein several and distinct and independent grounds of equitable relief, including an alleged cause of action for an accounting, and an alleged cause of action for an injunction, and the appointment of a receiver to take the administration of defendant's property and business out of the hands of this defendant. its officers and agents, and on other grounds.

The demurrer was argued before Hon. John R. Hazel, sitting in the Circuit Court for the Southern District of New York, and by him sustained. (The opinion of Judge Hazel appears at fol. 175.) Thereafter, and on January 18, 1906, a decree was entered sustaining the said demurrer and dismissing the said amended and supplemental bill of complaint (fols. 226–229). From this decree an appeal was prosecuted to the United States Circuit Court for the Second Circuit, and thereafter, and on the 7th day of February, 1907, said United States Circuit Court rendered a decision reversing the said decree sustaintaining the demurrer and dismissing the said bill of complaint, and remanding the cause to the Court below with leave to the defendant, if it should be so advised, to answer within such time as the Circuit Court should decree.

Thereafter the mandate of the said United States Circuit Court of Appeals for the Second Circuit was filed in said United States Circuit Court for the Southern District of New York, and thereon a decree was made and entered reversing the decree sustaining the demurrer and dismissing the bill, and providing that, upon payment of costs, The Equitable Life Assurance Society of the United States, the petitioner, if it should be so advised, might file an answer in said suit. Prior to the entry of said last mentioned decree the petitioner filed a petition before the said

United States Circuit Court of Appeals for the Second Circuit praying for a rehearing and reargument of the various questions of law involved in the bill, the prayer of which said petition was denied.

The Equitable Life Assurance Society of the United States, the petitioner, now applies to this Court for a writ of *certiorari* directed to the United States Circuit Court of Appeals for the Second Circuit, requiring it to certify said suit to this Court, for review and determination by it.

This application, as will hereinafter appear, is based upon the importance of the questions involved in said suit, and upon the ground that the decision of the said United States Circuit Court of Appeals for the Second Circuit is in conflict with the decisions of the United States Circuit Court of Appeals for the Third Circuit, the decisions of other Federal courts, and with the decisions of the Court of Appeals of the State of New York.

Argument.

The whole structure of the bill rests upon the single proposition that the assets of the petitioner are the property of its policyholders and are held by it in trust for them. Based upon this premise, the truth of which is assumed by the complainant as the foundation of his suit, the bill is filed for the purpose of removing the petitioner from its alleged trusteeship, obtaining the appointment of a substitute trustee to execute the pretended trust, and of compelling the petitioner, as such pretended trustee, to render an account of its administration of the alleged trust fund. The other relief sought, viz., a discovery and injunction, is merely incidental to the main purpose of the suit as thus set forth, and is sought in aid of it. Therefore, unless it be established that the relation between the insured and the insurer is

that of *cestui que trust* and trustee, there is no basis for any appeal to a court of equity upon the allegations contained in the supplemental and amended bill of complaint.

The petitioner's contention is that the only relation between the complainant and it is one which arises solely by reason of the contract of insurance existing between said complainant and your petitioner, and that if petitioner has not fully performed its contract with complainant, redress can be had only in an action at law for the recovery of damages for breach of contract.

The bill of complaint contains certain allegations of fraud which seem to have controlled the United States Circuit Court of Appeals in rendering its decision reversing the judgment of the lower court. Petitioner contends, however, that allegations of fraud do not, of themselves, confer jurisdiction in the absence of a right to relief of an equitable character, which cannot be granted by a court of law.

That no relation of trust exists between the insured and the insurer; that the relation between them is solely contractual, and that fraud is not a basis for equitable jurisdiction, is fully established by the authorities hereinafter cited.

I.

Certiorari may be granted.

While it is true that the power to grant a writ of *certiorari* will be sparingly exercised the Court has ample power to grant such writ when the circumstances of the case satisfy it

> "that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or be-

tween courts of appeal and the courts of a State * * * demands such exercise."

Forsyth *v.* Hammond, 166 U. S., 506–514.

The decree which the petitioner seeks to have reviewed by the issuance of the writ herein is an interlocutory decree, and while ordinarily a writ is not issued until after final decree, the Court will, in a proper case, issue the writ to review an interlocutory decree.

See

American Construction Co. *v.* Jacksonville Ry. Co., 148 U. S., 372, pp. 383–385.

Matter of Tampa Suburban Ry. Co., 168 U. S., 583, p. 587.

Matter of Lau. Ow. Beu., 141 U. S., 583, at p. 587.

Flannigan *v.* Sierra County, 196 U. S., 553.

II.

There is no relation of trust between the petitioner and the holders of policies issued by it. The only relation existing between them is one of contract.

It is clear upon principle, and settled by many authorities, both Federal and State, that no relation of trust or relation of a fiduciary nature exists between a life insurance corporation and the holder of a policy issued by it. The petitioner is a stock corporation, and the holders of its policies have no proprietary interest in its assets. The essential element in a trust is the existence of a trust fund to which the trustee has the legal title, but in which

the *cestui que trust* has a direct proprietary interest. A policyholder has no such interest in the assets of the insurance company.

The relation between the parties arises solely from the contract by the terms of which their rights must be governed. If the terms of the contract are violated by the petitioner the remedy of the policyholder is by an action at law to recover damages for breach of contract.

The following authorities support these propositions of law:

Everson *v.* Equitable Life, 68 Fed. Rep., 258; affd., U. S. Cir. Ct. App., 71 Fed. Rep., 570.

Hunton *v.* Equitable Life, 45 Fed. Rep., 661.

St. John *v.* American Mutual Life Ins. Co., 13 N. Y., 31.

Cohen *v.* Mutual Life Ins. Co., 50 N. Y., 610.

People *v.* Security Life Ins. Co., 78 N. Y., 114.

Uhlman *v.* N. Y. Life Ins. Co., 109 N. Y., 421.

Taylor *v.* Charter Oak Life Ins. Co., 9 Daly, 489; affg., 8 Abb. N. C., 331.

Bewley *v.* Equitable Life, 61 How. Pr., 344.

Buford *v.* Equitable Life, 98 N. Y. Supp., 152.

Pierce *v.* Equitable Life, 145 Mass., 56.

Greeff *v.* Equitable Life, 160 N. Y., 19.

If the decision of the Circuit Court of Appeals in the suit at bar is to be construed as supporting the jurisdiction of the Circuit Court upon any theory of a trust relation between the parties, which is complainant's contention, it is then clearly in conflict with the decisions of the United States Circuit

Court of Appeals for the Third Circuit in the *Everson* case, and of the Court of Appeals of New York in the *Uhlman* case, as well as with the decisions in the other cases above cited.

III.

The bill cannot be sustained as a bill for fraud because, so far as any fraud affecting complainant's rights is concerned, he has an adequate remedy at law.

The opinion of the United States Circuit Court of Appeals, if we understand it correctly, bases the jurisdiction of equity solely on the ground of fraud. The Court does not question the former decisions above cited in *Everson* v. *The Equitable Life Assurance Society; Uhlman* v. *New York Life Insurance Company; Bewley* v. *The Equitable Life Assurance Society*, and other cases, holding that there is no relation of trust between the complainant and the petitioner.

The question is, therefore, presented, whether the bill can be sustained in equity as a bill for fraud.

(*a.*) It is no longer true, at least in the Federal courts, that equity will take jurisdiction of every case of fraud. On the contrary, where the main object of the bill is to obtain relief that could be given by a court of law, equity will not take jurisdiction.

Ins. Co. *v.* Bailey, 13 Wall., 616, 623;
Buzard *v.* Houston, 119 U. S., 347, 352;
London Guarantee & Accident Co., Ld., *v.* Doyle, 130 Fed., 719;
U. S. *v.* Bitter Root Co., 200 U. S., 451.

In Ins. Co. *v.* Bailey, *supra*, the Court said (p. 623):

> "Courts of equity unquestionably have jurisdiction of fraud, misrepresentation and fraudulent suppression of material facts in matters of contract, but where the cause of action is a purely legal demand * * * a suit in equity will not be sustained in a Federal court, as it is clear that the case under such circumstances is controlled by the sixteenth section of the Judiciary Act."

Buzard v. *Houston*, *supra*, was a bill in equity for fraud brought, among other things, to obtain a decree for the payment of money. The Court dismissed the bill for want of jurisdiction and without prejudice to an action at law. The Court said (pp. 351, 352):

> "In the Judiciary Act of 1789, by which the First Congress established the judicial courts of the United States and defined their jurisdiction, it is enacted that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law * * *.' Five days later, on September 29, 1789, the same Congress proposed to the legislatures of the several States the article afterwards ratified as the Seventh Amendment of the Constitution, which declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The effect of the provision of the Judiciary Act, as often stated by this Court, is that 'whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy without the aid of a court of equity the plaintiff must proceed at law. * * * Accordingly a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief in kind or in degree on the equity side than on the common law side, as for instance

by compelling a specific performance, or the removal of a cloud on the title to real estate, or preventing an injury for which damages are not recoverable at law. * * *

"*In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages when the like amount can be recovered at law,*" &c.

That the bill in the present suit is essentially a bill for relief of a legal character will be apparent upon a brief analysis. Complainant's rights arise solely under a contract or policy of insurance. The bill is not brought for a rescission or reformation of the contract or for its specific performance. On the contrary it is brought to procure the payment or credit to complainant of money, viz., a portion of defendant's "surplus" which is alleged to be due under the contract and to have been fraudulently withheld and misappropriated, and incidentally for a discovery and accounting to ascertain the amount.

See First, Second, Fourth, Fifth and Sixth prayers for relief, at folios 96–99.

True, the bill also incorporates prayers for relief of an equitable character, viz., that a trust be declared to exist in favor of policyholders (Third prayer, fol. 97); that a receiver be appointed to take charge of the funds impressed with such trust (Eighth prayer, fol. 101), with a prayer for an injunction incidental to the receivership (Seventh prayer, fols. 99, 100). But none of these prayers can avail to support the jurisdiction of equity, because they all depend upon the theory of the existence of a trust relation, a theory which, while strenuously urged by the complainant, finds no support in the authorities.

It is confidently submitted, therefore, that the only relief to which complainant is entitled (assu-

ming the allegations of his bill to be true), is relief of a legal character, and the case falls squarely within the rule laid down in the cases above cited.

(*b.*) Nor does the fact that the bill also seeks discovery and an accounting, make a case for jurisdiction in equity.

Discovery and accounting are no longer sufficient ground for equitable jurisdiction in aid of relief of a legal character (in this case the payment of dividends alleged to have been wrongfully withheld).

U. S. Rev. Stats., Sec. 724;
Safford *v.* Eusign Mfg. Co., 120 Fed., 480;
London Guarantee & Accident Co., Ltd., *v.* Doyle, 130 Fed., 719;
U. S. *v.* Bitter Root Co., 200 U. S., 451.

Section 724 of the Revised Statutes provides that

> "In the trial of actions at law the courts of the United States may on motion and due notice thereof require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery," &c.

In the Safford case, *supra* (Cir. Ct. of Appeals, Fourth Cir., cited with approval 200 U. S., pp. 472, 478), a bill which sought an accounting and discovery under contract for royalties on a patent was dismissed. The Court said, among other things:

> "It has been held that in ordinary cases a pure bill of discovery can no longer be maintained in equity courts of the United States, because under Section 724 Rev. St. it is no longer generally needed (citing many cases). From these cases I deduce the doctrine that in a case in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be

> used in the enforcement of a purely legal demand, the jurisdiction cannot be sustained. To sustain it would * * * permit by indirection the entertaining of a bill for discovery although the trend of authority is that a pure bill for discovery cannot be maintained in the Federal courts because it is no longer necessary."

London Guarantee & Accident Co., Ltd., *v.* Doyle, *supra*, is a case closely in point. That was a bill for a discovery and accounting as to moneys due under a contract fraudulently broken by defendant. The Court sustained a demurrer and dismissed the bill, saying (at p. 720):

> "There is no relation of trust, properly so called, between the parties, and the only fraud charged is the defendant's declaration that 'the actual amount of said pay rolls was no greater than the estimated amount.' If this is not the truth the wrong can be fully remedied by compelling the production of the necessary books and papers in a suit at law. It is not necessary that the precise amount (if any) that is due by the defendant should be known to the complainant before the suit is begun. If the company claims enough to be on the safe side, the exact sum can be found out afterwards without doing harm to any one. The case is not distinguishable, I think, from Safford *v.* Ensign Mfg. Co., 120 Fed., 480."

U. S. *v.* Bitter Root Co., 200 U. S., 451, *supra*, was a bill for a discovery and accounting as to timber alleged to have been taken from complainant's land through a fraudulent conspiracy, the details of which were set forth in the bill. The Court sustained a demurrer on the ground that equity had no jurisdiction over the cause of action set up in the bill. The Court said (per Peckham, *J.*, p. 471):

> "Although there is a liberal use in the bill in this case of averments in regard to fraud,

conspiracy and violation of trust, of which the pleader avers the defendants have been guilty in various ways, yet, upon a careful examination of the pleading itself and the actual facts therein stated, we concur in the view of the courts below that the action is really nothing but an action of trespass or trover to recover damages sustained by the complainant * * * and for the wrongs thus done, we think it clear that the complainant has a plain, adequate and complete remedy at law, and consequently the court has no jurisdiction of this bill in equity. It is not necessary to cite many authorities for the proposition that where the main cause of action is of a legal nature equity has no jurisdiction; provided the complainant has a full and adequate remedy at law for the wrongs complained of (citing cases). A mere charge of fraud does not give equity jurisdiction. * * * The principal ground upon which it is claimed that the remedy at law is inadequate is really nothing more than a difficulty in proving the case against the defendants. The bill shows that whatever was done * * * was done by the defendants as tort feasors, and the various devices alleged to have been resorted to * * * by way of organizing different corporations in order to, as alleged, cover up his tracks and to render it more difficult for the complainant to make proof of his action, does not in the least tend to give a court of equity jurisdiction on that account. * * * The complainant is entitled in an action at law to an inspection of the books and records of these various corporations, and it has the same power to obtain the facts therefrom in that action as it would have in this suit in equity."

IV.

The United States Circuit Court of Appeals misapprehended the force and effect of the dicta in the case of Uhlman v. New York Life Insurance Company (109 N. Y., 421).

The Circuit Court of Appeals, as will appear from its decision *per curiam*, in reversing the lower court relies mainly upon the *dicta* in the *Uhlman* case. The Court quotes the language of Judge Peckham to the effect that the plaintiff in that case had made "no proof of misappropriation or wrongdoing," and also to the effect that

> "the plaintiff and all others similarly situated, have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial and make proof of such allegations, and if proved, the Court will declare the proper principles upon which the apportionment is to be made, so as to become an equitable apportionment,"

and the Circuit Court of Appeals then proceeds to rule that,

> "in the case at bar the precise situation is presented which was foreshadowed in the opinions referred to above, and thereby this case is differentiated from the preceding cases. Here the reports referred to and made a part of the bill are replete with specific circumstantial allegations of the precise facts constituting the fraud, waste and mismanagement complained of in connection with a detailed showing, either of direct loss of funds or of illegal and unauthorized diversion and misappropriation of a considerable share of profits belonging to defendant and of further waste and mismanagement by the payment of salaries originally excessive and unwarrantably in-

> creased, and of improper investments of and failures to invest the funds of defendant, particularly set forth in detail, all resulting in perpetuation of wrongs on the policyholders, through violation of defendant's obligations to them,"

and the Circuit Court of Appeals then holds that complainant

> "has a right to appeal to a court of equity for relief"

upon the facts alleged in the bill.

The question which the New York Court of Appeals in the *Uhlman* case was considering, and the only question, was whether a tontine policyholder had a right to invoke the aid of a court for the purpose of reviewing the correctness of an apportionment which had been made under the terms of the contract between the policyholder and the company. The plaintiff had a tontine policy, under the terms of which the company had agreed to "equitably apportion" the surplus or profits to be derived from a particular class of policies. The question before the Court was whether the holder of such a policy, after the expiration of the period, and after the right to an apportionment had accrued, was entitled to have the *correctness of the company's apportionment* inquired into judicially. The Court held that there was no absolute right to have the Court make such inquiry; that the apportionment made by the company was to be taken, as *prima facie*, correct, and that an order to invoke the assistance of the Court and to obtain a judicial inquiry into the correctness of the apportionment made by the company, it was necessary for the plaintiff to make some *prima facie* case of error or of wrongdoing *in the matter of the apportionment*.

The bill in the case at bar *does not seek to review the action of the Society's officers in making an apportionment* of the Society's surplus as between the various classes of policyholders or as between the tontine or deferred dividend policyholders on the

one hand and the non-tontine or non-deferred dividend policyholders on the other hand—as was sought to be done by the bill in the *Uhlman* case.

On the contrary, the bill in this suit seeks to review the Society's dealings with the policyholders as a body and to show—not that the Society has *wrongfully apportioned* its surplus, but that it has *failed to apportion* a considerable part of its surplus, wrongfully withholding the same from the policyholders. This clearly gives rise to a cause of action at law for breach of contract, if it gives rise to any cause of action whatever.

The Court in the Uhlman case did not rule, nor was it a necessary or proper inference from the Court's ruling, that in any event the plaintiff would be entitled to an accounting *in equity*. The Court had already explicitly ruled in that case, as it had done in previous, cases and has since done in the case of *Greeff* v. *Equitable*, that the rights of a policyholder in a mutual company, were rights solely *based on contract*, and that there was no inherent right to go into a court of equity, because of any fiduciary relation existing between the policyholder and the company, or because of any specific interest in the funds of the company as such.

The decision in the *Uhlman* case cannot properly be construed as holding that the plaintiff's remedy is *in equity*, even though it is to be construed as holding that there is *some remedy* for the complainant where a *prima facie* case is made of wrongdoing on the part of the defendant. That remedy would be in its nature a suit for breach of contract, and would be an action at law for failure to properly apportion the surplus as required by the contract.

It is further to be observed, however, that the Court of Appeals in the *Uhlman* case did not decide that *charges of wrongdoing or fraud* on the part of the officers of the Society, *affecting the Society itself*, or *all of the policyholders as a body*, would make a case for the re-examination by the Court of the

method and principle of apportionment of dividends as between the various policyholders.

What the Court of Appeals was considering in the *Uhlman* case, was not any charges of fraud wrongdoing by the officers or managers of the Company, which might give rise to a cause of action for waste, or a cause of action in equity for an accounting to the Company as a Company, but what the Court of Appeals was considering was the right of a policyholder to have the amount which had actually been apportioned to him as a dividend inquired into and re-examined, and the question of the correctness of the principle on which it had been apportioned inquired into.

So far as the opinion of the Circuit Court of Appeals intimates that fraud or wrongdoing on the part of the officers of the Society gives a remedy in equity, we submit that that Court has fallen into error, being misled by the supposed analogy of the *Uhlman* decision.

V.

So far as the bill in the case at bar charges that the Society has failed to distribute its entire "net surplus" as shown by its annual statements, the bill is obnoxious to the objections taken to the complaint in the Greeff case (*Greeff* v. *Equitable Life Assurance Society, 160 N. Y., 19*).

In that case it was held that an accumulated fund is not required by law to be distributed among the policyholders merely because the fund has been denominated by the officers of the company as surplus, instead of a reserve fund.

Page 33:

> "The learned Appellate Division, while it admitted that the defendant had a large discretion in determining the amount of its surplus, and that it might increase its reserve

fund for the security of its policyholders and to cover any contingent liabilities that might arise, taking such steps and adopting such principles and methods as were demanded by wise and prudent management to insure the prompt payment of losses and to successfully carry on and extend its business, still held that as the fund remaining in the defendant's hands had been denominated by it as surplus, instead of a reserve fund, all the usual powers and authority of its directors and managers to determine how and when it should be distributed, and all their discretion as to the manner of its disposition were spent, and, hence, they were required, as matter of law, to distribute the entire amount among its policyholders. We are not disposed to agree with that conclusion. We think this case should not be decided upon any such narrow or technical ground. It should be determined upon a fair interpretation of the intent and purpose of the provisions of the policy, and not by giving to a single word an undue, unusual or exaggerated effect. In a sense, all the funds in the possession of a mutual insurance company, over and above its immediate and present liabilities, may be regarded as surplus, yet it is not for that reason understood as belonging to, or to be immediately distributed among the policyholders, either by them or by the company. If the same exaggerated meaning were to be given to the word 'liabilities' when applied to demands against the company, as was given to the word 'surplus,' it would include the full face amount of all its outstanding risks or policies, and no surplus would ever exist. The word 'surplus' like the word 'liabilities' has acquired a special meaning in this branch of the insurance business. *Under the provisions of this policy it is plain that the surplus and the distributable surplus are regarded as two distinct and separate funds.* The liabilities of a life insurance company are calculated upon rules based upon experience, which are dependent upon various contingencies. As applied in that class of insurance, the liabilities of a company do not represent the full amount of outstanding policies.

So the word 'surplus' is used to designate the amount of funds in the hands of the company after deducting its liabilities as ascertained by certain rules adopted by the Insurance Department for determining the value of each risk. *Obviously the word 'surplus' was not used in the defendant's charter or policy to designate the amount of money in the company's hands which was to be distributed among its policyholders,* but to represent the amount which should remain after certain calculated liabilities were deducted. When that amount was ascertained, it became the duty of the officers of the defendant to determine the portion of such surplus which should be distributed and the portion which should be retained for the benefit and security of the company and its members. *We find nothing in the policy which requires the defendant to distribute its entire surplus among its policyholders.* It is only required to credit to each policy an equitable share of the surplus, after deducting an amount sufficient to cover all outstanding risks and obligations. Under that provision the defendant had the right to retain out of its surplus an amount sufficient to insure the security of its policyholders in the future as well as at present, and to cover any contingencies that might arise or be fairly anticipated. Obviously, *it could not have been the intent of this provision to require the defendant to distribute its entire surplus,* so that any depreciation in its investments or increase of its liabilities by some unusual condition, or any change of the rate of interest in calculating its reserve would, of necessity, render it insolvent."

VI.

So far as the bill in the case at bar charges that a portion of what should have been the surplus had been wasted or misappropriated by the company's

officers, the only cause of action set forth in the bill is one which shouldbe brought in the name of and for the benefit of the Society as a corporation and not in the name of or for the benefit of policyholders who are merely contract creditors and who have not obtained any lien on the assets by way of judgment or otherwise and who have no claim as *cestuis que trustent*, as is perfectly well settled by all the cases.

It is not seriously claimed by counsel for the complainant that any case of insolvency is made out by the bill. In fact the allegations of the bill clearly set forth that there is a very considerable surplus over and above all liabilities, and that the defendant corporation is in every sense of the word entirely solvent. If, therefore, the policyholders are to be regarded as merely contract creditors, as held in the *Uhlman* case and the *Greeff* case, and all the other cases referred to under Point II., it follows that no suit can be sustained by such creditors to reach the assets of the corporation.

In *Graham* vs. *Railroad Company*, 102 U. S., 148, it is said by Mr. Justice Bradley, at p. 160:

> "It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.
>
> "We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an indi-

vidual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

"When a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

If a creditor cannot interfere with the management of the assets of the corporation so long as it is solvent, it follows that a policyholder (who, as is held by the authorities, is *merely a creditor and has only the rights of a creditor*), cannot assert the right of a stockholder to enforce in the name of the corporation the rights of action of the corporation for wrongful diversion of assets from the corporation by its officers or directors.

VII.

Furthermore, it is manifestly impossible to decree an accounting in this suit based upon waste of the Society's assets.

Suppose it be ascertained that $1,000,000 has been wrongfully taken from the assets of the Society by its former officers and directors, a decree cannot be made in this suit that the Society account to its

policyholders for $1,000,000 which it does not possess. The directors and officers, who are claimed to have been responsible for such depletion of the Society's assets are not made parties defendant and cannot be compelled in this suit to refund or make good the $1,000,000 taken from the Society's surplus. The frauds, therefore, which are alleged in the bill, and which were held by the Circuit Court of Appeals to be sufficient to sustain the suit as a suit for an accounting are, we submit, not sufficient to sustain the bill, since, *even if the allegations are established by proof*, the Society *cannot apportion*, nor can any decree in this suit require that it shall apportion among the policyholders *the amounts of money so wasted or misapplied*, since the present officers and directors of the Society cannot apportion among its policyholders assets which it does not in fact possess, even though there be a theoretical right on the part of the present directors and officers of the Society to recover the assets wasted and misapplied, by a suit against the former officers and directors.

VIII.

It seems also sufficiently obvious that if this bill is to be sustained either as a bill to recover assets wasted by the officers of the Society, or as a bill for a receiver and to wind up the Society, there is a clear defect of parties defendant.

In any suit brought for a recovery of the assets alleged to have been wasted or wrongfully diverted from the Society, the officers and directors are necessary parties; at least, those of them who are alleged to have profited by the wrongful use of the funds of the Society.

In any suit brought for the appointment of a Receiver and the winding up of the corporation the stockholders are certainly necessary parties, since

it is their corporation which is sought to be wound up, and they are vitally interested in the question of whether the corporation shall be allowed to proceed in its business.

So far as this suit is brought to obtain a decree that the surplus of the Society over and above the $100,000 of capital stock belongs to the policyholders and not to the stockholders, there is a clear defect of parties defendant, in that the stockholders are vitally interested in this question. The corporation itself is not the proper party to protect the interests of the policyholders as against the interests of the stockholders. Nor would a decree in this suit against the rights of the stockholders be any protection to the Society or to the policyholders as against the stockholders themselves.

It is a general principle of courts of equity that all parties whose interests will be affected by the decree, should be before the Court, and any decree rendered in their absence affecting their property rights is utterly ineffective, and if such parties are not before the Court, the Court will dismiss the bill of its own motion, even if no demurrer is interposed.

See

Minnesota *v.* Northern Securities, 184 U. S., 199, pp. 235–7.

Christian *v.* Atlantic & N. C. R. R. Co., 133 U. S., 233, page 241.

Gregory *v.* Stetson, 133 U. S., 579, at p. 586.

Indeed, the present bill goes so far as to claim that *all* of the *assets* of the Society belong to the policyholders to the exclusion of the stockholders, and seeks to impress a trust in favor of the policyholders upon all of the assets. Surely the stockholders are entitled to be heard upon any such claim, and no effective decree can be made, in their absence, upon this branch of the case.

In the case of the *People against The Equitable Life Assurance Society*, decided by Mr. Justice

Bischoff (see Opinion reported in 51 New York Miscellaneous Rep., 339), which was a suit brought against the officers and directors of the defendant Society to recover for the alleged acts of waste and misappropriation, which were disclosed by the investigation of the Frick Committee and of the Superintendent of Insurance, which are set forth in the bill of complaint in this suit, the Attorney-General sought also to recover for failure to distribute to policyholders the share of the profits of the corporate enterprise called the "surplus," to which it was claimed they were entitled under the charter and by-laws. The Court held that as to this cause of action there was a defect of parties in the nonjoinder of the policyholders, or one or more of them, as the representatives of all. The objection as to nonjoinder of stockholders was not raised or passed upon, but it would logically follow that if the question of the right to the surplus could not be passed upon in the absence of the policyholders, *a fortiori* it could not be passed upon in a suit brought by the policyholders in the absence of the stockholders. The Court says, at p. 351:

> "From the nature of the case, the record would be incomplete for the purpose of the judgment sought, unless these persons, whose interests are to be concluded, be joined, and no reason is suggested for a departure in this case from the rule, which requires that parties who are to be actually affected by a decree and whose rights and interests are to be measured thereby should be before the Court."

IX.

The main relief sought by the bill of complaint appears to be an accounting covering all the transactions of the petitioner for a period of upwards of forty-five years, and for redress by reason of the al-

leged waste, misappropriation and misapplication of the funds and assets of the petitioner. These allegations of waste and misappropriation are charged against officers and directors of the petitioner. None of the officers or directors are made parties defendant, and even if, upon such an accounting, it should be shown that they had wrongfully or fraudulently wasted or misappropriated the petitioner's assets, no decree could be entered requiring restitution thereof.

The petitioner has outstanding assurance contracts aggregating $1,495,542,892 and assets of $413,953,-021, which includes a surplus over all of its liabilities of $80,794,269 (fol. 39). It has upwards of five hundred thousand policyholders resident in the various States of the United States as well as in foreign countries, and if this suit can be maintained by one of such policyholders, every other one of them may maintain a similar suit against your petitioner, demanding a similar accounting in the jurisdictions in which such suits may be brought. The expense of an accounting covering upwards of forty-five years, during which period the Society has done business, and involving the vast amount of assets of which it is possessed, will be enormous, and will fall solely upon the body of policyholders, whether they be in sympathy with the suit or not.

As suggested above, if one suit may be maintained any number of them may be, with the result that a great part of the Society's assets will of necessity be expended in accountings in suits in equity, in which may be entered decrees which will be fruitless, in view of the fact that the officers and directors against whom charges of waste and mismanagement may be made are, under the decision of the United States Court of Appeals in this case, unnecessary parties defendant to the such suits.

Insurance corporations and their officers and directors should be subject to the supervision and control of the authorities of the State of the creation of such companies, and all actions for accounting

should be brought by or under the supervision of such authorities.

The Attorney-General of the State of New York is clothed by the statutes of the State with full authority to bring suit against the officers and directors of the Society to recover assets wrongfully misappropriated. The presumption of law is that he has brought such suit as his duty required—a presumption, we may be permitted to add—which, if the facts were fully set forth in the bill up to the present time, would be shown to be justified by the event.

A reference by the Court to the decision already cited under the previous point, namely, *People against Equitable Life Assurance Society*, 51 New York Miscellaneous Rep., 339, will show the nature of the suit thus brought and the scope of the relief prayed therein.

In spite of the wave of righteous indignation which has been aroused by the insurance investigations of 1905, it still remains as true to-day as it was at the time of the *Uhlman* decision, that it is the duty of the Courts, and particularly of courts of equity, to protect insurance companies from merely harrassing and annoying litigations which can be of no substantial benefit to the policyholders.

A court of equity has the right and is bound to consider the relative advantages and disadvantages of granting equitable relief.

> "It *gives or withholds* (*its*) *decree* according to its *discretion*, in view of the circumstances of the case."
>
> *Trustees of Columbia College* v. *Thacher*, 87 N. Y., 317.

> "A court of equity will not do an inequitable thing. It is not bound by the rigid rules of the common law, but is founded to do justice, where the courts of law, with their less plastic remedies, are unable to afford the exact relief which the facts require. Its fundamental principle, as its name implies, is

equity. *It withholds its remedies if the result would be unjust*, but freely grants them to prevent injustice where the other Courts are helpless."

McClure v. *Leaycraft*, 183 N. Y., 36, 41.

See also

New York v. *Pine*, 185 U. S., 93.
Penryhn Slate Co. v. *Granville El. L. & P. Co.*, 181 N. Y., 80.
Knoth v. *Manhattan Ry. Co.*, 187 N. Y., 243.

It is proper also in this connection to call the attention of this Court to the fact that since this suit was commenced the Legislature of the State of New York has adopted remedial legislation which renders practically unnecessary any judicial determination as to the rights of policyholders in the surplus of the Society.

See Chapter 326 of the Laws of 1906 amending the Insurance Law of the State.

See especially Section 23 amending Section 83 of the Insurance Law, with regard to distribution of surplus to policyholders and providing for apportionment of surplus among the policyholders.

See also Section 26 amending the Insurance Law by adding a new section, known as Section 87 and providing for a so-called "contingency reserve," which in effect provides that any domestic life insurance corporation may accumulate and maintain in addition to its net reserve, as required by law, a contingency reserve, which in the case of a corporation whose net reserve exceeds $75,000,000, shall not exceed five per centum thereof, unless for cause shown the Superintendent of Insurance shall permit the corporation to accumulate and maintain a contingency reserve in excess of such limit for a prescribed period.

It is therefore submitted, in view of the fact that the questions of law presented in this suit as to the

relations between the policyholders of life insurance companies has never been before this Court for its determination, and as such questions are of vital interest not only to the insurance companies themselves but to the vast bodies of policyholders interested therein, that this case is one of sufficient importance to make it proper that a writ of *certiorari* should issue at this stage of the case.

Conclusion.

In view of the conflict between the decisions of the United States Circuit Courts of Appeal for the Second and Third Circuits, and in view of the importance of the questions involved in the suit between the complainant and the petitioner, it is respectfully submitted that a writ of *certiorari* should be issued, directed to the Circuit Court of the United States for the Second Circuit, requiring it to certify to this Court for review and determination the said suit.

WILLIAM B. HORNBLOWER,
ALLAN MCCULLOH,
Of Counsel for The Equitable Life Assurance Society of the United States,
Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1906.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner,

against

J. WILLCOX BROWN, on behalf of himself, &c.,
Respondent.

IN THE MATTER OF THE APPLICATION OF THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES FOR A WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Previous to the decision of the Circuit Court of Appeals in this suit, policy holders of all classes, although claiming that the Society's methods of apportioning their surplus was fraudulent and erroneous, were, for one reason or another, statutory or judicial, repulsed in the Courts. An internal dispute revealed to the world the astonishing and infamous frauds which had been committed by the Directors in the management of the Society; causing first an official investigation, and subsequently, the repeal of the 56th Section of the Insurance Law of New York, which prohibited any suit by a policy holder for an accounting or otherwise, against the Society, except at the

instance of the Attorney General of the State of New York. The Bill filed in this case contains a very detailed statement of the facts relating to the management of the Society. A demurrer was filed to it, upon various grounds, which was sustained by Mr. Justice Hazel, and the amended and supplemental Bill of Complaint dismissed. Upon appeal by the complainants to the Circuit Court of Appeals, the judgment entered upon the demurrer in favor of the defendant was reversed, and leave was given to it to answer over.*

AN APPLICATION, ACCOMPANIED BY A BRIEF ENFORCING THE SAME, WAS PRESENTED TO THE COURT FOR A RE-HEARING, WHICH WAS DENIED. The defendant now moves this Court for a Writ of Certiorari to enable it to review this

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* The substantial part of this decision is as follows:

An examination of the authorities which are material to this discussion shows that, upon whatever other grounds the courts may have reached conclusions adverse to the rights of policy holders, yet in none of said cases in the federal courts or in the court of last resort of the State of New York have there been definite, specific allegations of facts charging bad faith, willful neglect, abuse or indiscretion, fraud or misappropriation by the defendant. A single citation from the opinion of the court in Uhlmann *vs.* New York L. I. Co., 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482, will serve to illustrate the principle which appears to be applicable generally to the cases cited by the defendant where these questions have been considered.

In the Uhlmann Case, Judge, now Mr. Justice Peckham, delivering the opinion of the court, says as follows:

"We do not, however, accede to the claim of the defendant herein to its full extent as made in the brief submitted, which is that the apportionment, as made by the defendant, is absolutely, and at all events, conclusive upon the policy holders. We hold that, under the terms of this policy, the apportionment was to be equitably made, and, in the first instance, by the defendant's officers or agents. But, inasmuch as the agreement is that the apportionment shall be an equitable one, the question of what is an equitable one, all the facts and circumstances being known, may be one over which the courts have supervision. *Prima facie* the apportionment as made by the defendant should be regarded as a compliance with the terms of the policy, or, in other words, should be regarded as an equitable apportionment. It should be thus regarded, because by the terms of the policy the duty of making it is cast upon the corporation, and it ought to be

interlocutory decree, before answer or other proceedings had.

One ground advanced for the Certiorari is that an appeal or writ of error would not lie from a final judgment in this suit. The defendant seeks to overleap this barrier by asking the Court to review the interlocutory order. There being no answer interposed, or issue made, it is of course impossible to say whether the defendant can finally prosecute an appeal to this Court or not. It is not disclosed what answer will be made to the Bill. *Non constat* that the defendant may set up some ground therein involving a violation of a statute of the United States, or of the Constitution of the United States, or its amendments, which would entitle it to a direct appeal or writ of error to this Court. In fact, such an issue has already been raised by some of the stockholders in the Lord suit, which

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presumed that the defendant has performed its duty instead of presuming that it has failed to do so. But the question is still left: Has or has it not complied with its agreement to make an equitable apportionment? And the plaintiff, and all others similarly situated, have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial and make proof of such allegations, and, if proved, the court will declare the proper principles upon which the apportionment is to be made, so as to become an equitable apportionment. The various cases cited in the briefs submitted, where the Legislature has appointed parties to apportion stock in a bank created by its laws, etc., and where the courts have held that the apportionment by the board thus created was final, do not, we think, conclude us here. The principles are entirely different. But as the plaintiff herein has made no proof of any misappropriation or wrongdoing, we are of the opinion that, upon the first question argued, he has failed to show any right to an accounting by the defendant."

To the same effect are the decisions in Fuller *vs.* Metropolitan Life Ins. Co. (C. C.) 37 Fed. 163; Pierce *vs.* Equitable Life Assurance Co., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433; Everson *vs.* Equitable Life Assurance Co. (C. C.) 68 Fed. 258; Greeff *vs.* Equitable Life Assurance Co., 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659; Fuller *vs.* Knapp (C. C.) 24 Fed. 100.

In the Greeff Case, *supra*, which was an action at law, the court held that, if the action were to be regarded as one for an accounting, it was

is referred to in the Bill,† and where it is alleged that they are entitled to all the surplus of the Society, and claim that any distribution of such surplus among the policy holders, would be an impairment of the obligation of a contract and in violation of the Constitution of the United States.

The attempt, through an interlocutory decree, to have this case reviewed is, therefore, quite premature, and we submit on no other ground, sustainable or justifiable.

We have taken the pains to count the number of applications which have been made to this Court for leave to review by a Certiorari since the present law and practice

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prohibited by section 56, c. 690, p. 1958, of the Laws of 1892 of the State of New York.

Inasmuch as counsel for the defendant state in their brief that "this statutory provision has been repealed since the decision was rendered" below, and have neither discussed the point in their brief nor in the oral argument, the statute cannot now be regarded as a bar to this suit.

In the case at bar the precise situation is presented which was foreshadowed in the opinions referred to above, and thereby this case is differentiated from the preceding cases. Here the reports referred to and made a part of the bill are replete with specific circumstantial allegations of the precise facts constituting the fraud, waste, and mismanagement complained of, in connection with a detailed showing either of direct loss of funds, or of illegal and unauthorized diversion and misappropration of a considerable share of profits belonging to defendant, and of further waste and mismanagement by the payment of salaries originally excessive and unwarrantably increased, and of improper investment of, and failures to invest, the funds of defendant, particularly set forth in detail, all resulting in penetration of wrongs on the policy holders through violation of defendant's obligations to them.

In these circumstances, and without passing upon any of the other questions presented as to the respective rights and obligations of the parties, we conclude that upon the facts alleged in the bill, and, for the single purpose of testing its sufficiency, admitted by the demurrer, complainant has a right to appeal to a court of equity for relief, and that the defendant is bound to answer the allegations of the bill.

Brown *vs.* Equitable Life Assurance Soc., 151 Fed. Rep., 1, 2, 3.

† Fol. 44, Transcript of Record in Circuit Court of Appeals.

prevailed,* and we find that they amount to about 1,250 cases.

The defendant† from this large number cites but four cases to sustain this application, stating that

> "while ordinarily a writ is not issued until after final decree, the Court will, in a proper case, issue the writ to review an interlocutory decree."

We take the cases in the order cited in the petitioner's brief.

In the case of American Construction Co. *vs.* Jacksonville Railway,‡ a rule was granted to show cause why a Writ of Certiorari should not issue, on the ground that a Justice before whom a question had been heard, took part in the hearing and decision of the same cause in the Circuit Court of Appeals. This Court, holding that such a question was

> "a novel and important one, deeply affecting the administration of justice in the Circuit Court of Appeals,"

granted the order to show cause; but the petition was subsequently dismissed *at the instance of the petitioner himself*. It should be observed that the decree attacked, on the ground that it was a nullity, was practically a *final* decree of the Circuit Court of Appeals. And the point involved was jurisdictional as to whether a Circuit Judge could sit in review of his own decision in the Circuit Court of Appeals. The language of the Act giving this Court power to review by Certiorari being

> "In any such case as is hereinbefore made *final* in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require by *Certiorari* or otherwise any such case to be certified to the Supreme Court for its review and determination."

In the second case cited by petitioner in this case§ the

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* Act of March 3, 1891, C. 517.

† Page 11 of his Brief.

‡ 148 U. S., 372, pp. 383-385.

§ *In re* Tampa Suburban Railroad Company, 168 U. S., 583.

application for leave to file the petition was denied on the ground that the petitioner had "another adequate remedy,"* *i. e.*, an appeal to the Circuit Court of Appeals, which the petitioner in the present suit has already exhausted.

In the third case cited by petitioner† a judgment had been rendered by the Circuit Court, remanding the petitioner to the custody of the U. S. Marshal for deportation. From this judgment an appeal was prosecuted to the Circuit Court of Appeals, which

> "declined to certify any question of law in the case to this Court for instruction and affirmed the judgment of the Circuit Court."‡

In that case, it will be seen, the judgment was *final*, and the Writ of Certiorari was allowed, the Court observing that it

> "involved a grave question of public international law, affecting the relations between the United States and a foreign country." §

Under the Act of 1891, the relation between the United States Circuit Court of Appeals and this Court are sympathetic and harmonious. In the first place, the Circuit Court of Appeals *may at any time* certify to this Court any questions or propositions of law, concerning which the Court desires instruction for proper decision, whereupon this Court may either give its instruction on the questions and propositions certified, or may require the whole record and cause to be sent up for consideration, and thereupon decide the whole matter in controversy, as if it had been brought here for review by writ of error on appeal. This puts it in the power of the Circuit Courts of Appeal to draw upon the legal knowledge and author-

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* P. 587.

† Matter of Lau Ow Ben, 141 U. S., 583-587.

‡ P. 586.

§ See 148 U. S., p. 383, Am. Const. Co. *vs.* Jacksonville Railway.

ity of this Court, at any time, whatever instruction they need upon any branch of law involved in cases under their control.

On the other hand, if the Circuit Courts do not act, it is provided in the same section, that any case in which the judgment of the Circuit Court of Appeals *is made final*, may be required by this Court by Certiorari or likewise to be certified to it for review and determination, as if it had been brought here on appeal or writ of error. The attempt to review here by Certiorari, when no answer is interposed, is certainly rebuked by this third decision which we are considering. Not only that, but the application for a *re-hearing* in the case at bar, was tantamount to a request that the Circuit Court ask to be instructed by this Court, which was refused.

The fourth and last case cited by the Petitioner is Flannigan *vs.* Sierra Co.* Certiorari in that case was not allowed by this Court to review an interlocutory decree. There was an *absolute and final* judgment against the petitioner.† Hence the case is no authority in favor of this application.

It is then urged as further ground for the allowance of the Certiorari that

> "the decision of the said United States Circuit Court of Appeals for the Second Circuit in effect hold that there is equitable jurisdiction in said Circuit Court of the United States, which decision if based upon the theory that a trust relation exists as claimed by the Complainant, is in conflict with decisions heretofore rendered in the United States Circuit Court of Appeals for the Third Circuit, and also in conflict with the decisions of the Court of Appeals of the State of New York, as well as in conflict with decisions in other cases which will be cited upon the brief hereto."

The authority cited for this proposition is Forsyth *vs.* Hammond.‡

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* 196 U. S., 553.
† See p. 558.
‡ 166 U. S., 506–514.

But it will be seen at a glance that Forsyth *vs.* Hammond is not a precedent for this application, for in that case there was a dispute between the Court of Appeals and the Supreme Court of Indiana *as to the identical subject of the litigation.*

This Court said:

> "There was a conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court of the State of Indiana. The latter court had declared that the proceedings by which the contiguous territory was annexed to the City of Hammond were *legal.* * * * The United States Circuit Court of Appeals by its decision in this case had declared that *such annexation proceedings were invalid.* * * * All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested."

But, we respectfully submit, that there is no conflict between the Circuit Court of Appeals of the Third Circuit, and the Circuit Court of Appeals of this District, upon the general question of law involved. The case of Everson *vs.* Equitable Life Assurance Co.* is cited to sustain petitioner's assertion. The Circuit Court of Appeals, in the case at bar, evidently did not think there was any conflict because it cited it to sustain its conclusion. Besides the two cases are radically dissimilar—dissimilar from top to bottom.

1. In the Everson case there was an *individual* bill filed seeking personal relief. The case at bar is an omnibus suit, *brought in behalf of all persons similarly situated,* and binding upon all, and it invokes a distinct and clear ground of equity jurisdiction. It would lie, even if there were no trust, upon the ground of inadequacy of law to furnish an appropriate remedy, in connection with the prayer for an accounting and discovery.

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* 68 Fed. Rep. 258, 71 Fed. Rep. 570.

2. In that case the Court, in effect, conceded if there were sufficient allegations of fraud the bill would lie, but it said that the allegations of fraud and false valuations in that case

> "are of such *a vague and general* nature, and *there is such an absence of specific fact and detail, that as bearing on the question of fraud, we are justified in disregarding them.*"

But even if it were conceded that the two Circuit Courts of Appeals, differed on a question of general law, that would furnish no ground for the issuance of a Writ of Certiorari to review an interlocutory order.

The time for such a step would be after *final* judgment, when all of the questions of law would have been maturely considered. At such a juncture this Court could clearly say whether there was any such conflict as is claimed and not before.

Finally, the petitioner claims that the United States Court of Appeals in this case misapprehended the force and effect of the dicta in the case of Uhlman *vs.* N. Y. Life Insurance Co.* In that case the Court laid down the law in full, broad and explicit terms in the language which is quoted in full in the opinion of the Circuit Court of Appeals in this case.†

No one more keenly understood the views thus clearly enunciated by Mr. Justice Peckham, and no one appreciated their force more than this defendant Society, for directly the opinion was rendered it proceeded to counteract the effect of the decision, which opened the doors to the policy holders, by procuring an act of the Legislature of New York, known now as the 56th Section of the Insurance Law, in which the door was again shut in their faces, and the policy holders effectually prevented from seeking the equitable remedy which the Court clearly held existed

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* 109 N. Y., 421.

† See *ante*, p. 2.

in their favor when proper allegations were made. The immediate effect of the disclosures affecting this Society, which are, circumstantially, set forth in the Bill was to cause the Legislature of New York to repeal this 56th Section, as we have stated, and the position of the policy holders in New York is again restored and they are free to invoke the courts of equity to compel proper and conscionable apportionments of the surplus.

As the Court of Appeals said in this case:

> "Inasmuch as counsel for defendant state in their brief that 'this statutory provision has been repealed since the decision was rendered' below and have neither discussed the point in their brief nor in the oral argument, the statute cannot now be regarded as a bar to this suit."*

We refrain from discussing the questions of law involved in this suit, except to state that they are of a purely general nature, nothing exceptional or extraordinary arising out of the facts.

The central point made by the petitioner is that no trust exists between the policy holders and the defendant Society. That is a question of general commercial law which, if important enough, can be considered by this Court on application for Certiorari when a final judgment has been entered.

But it is pertinent to state that the learned Judge Hazel, who sustained the demurrer of the defendant, admitted that

> "Undoubtedly *an element of trust* and confidence is present in an arrangement by which life insurance becomes payable according to the terms of the policy upon compliance by the assured with the imposed conditions."

It is a coincidence that Mr. Justice Hazel used the identical language employed by the Supreme Court of

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* Brown vs. Eq. Life Ass. Soc., 151 Fed. Rep. App., 3.

the United States in the case of Oelrich *vs.* Spain,* where it is said: "The direct proceeding in equity will save time, expense and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Besides, there is *an element of trust* in the case, which, wherever it exists, always confers jurisdiction in equity." It is perfectly manifest that in the case at bar, no adequate remedy of law exists. In fact there is no remedy at law at all, in a case where necessarily, to reach a result, the rights of all of the different classes of policy holders must be adjudicated, to say nothing of the right of a Court of Equity to restrain the extravagance, waste and fraud being committed upon the property of the policy holders by the defendant, all of the facts being circumstantially set forth in the Bill.

We therefore respectfully submit that the application for a Writ of Certiorari should be refused, and the defendant be put to its answer.

JOHN R. DOS PASSOS,
JOSEPH DEF. JUNKIN,
GEORGE GORDON BATTLE,
H. SNOWDEN MARSHALL,
Of Counsel for Respondent.

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*15 Wall., page 211, at page 223.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Petitioner, AGAINST J. WILLCOX BROWN on behalf of himself, etc., Respondent.	No. 74.

BRIEF FOR PETITIONER.

Statement.

This suit comes before this Court by writ of *certiorari* granted by this Court to review a decision of the United States Circuit Court of Appeals for the Second Circuit. By that decision, rendered on the 7th of February, 1907, a decree of the Circuit Court of the United States for the Southern District of New York, sustaining a demurrer on behalf of the defendant The Equitable Life Assurance Society of the United States to an amended and supplemental bill of complaint herein was reversed, and said demurrer was overruled, and the cause was remanded to the Court below with leave to defendant, if it shall be so advised, to answer over within such time as the Circuit Court shall decree.

This suit is brought in equity by the complainant as a policyholder of the defendant Society on behalf of himself and all other policyholders and annuitants of said Society who may choose to

come in and join in this suit. During the pendency of the suit only 26 out of more than 500,000 policyholders have intervened and become parties to this suit.

The defendant Society was incorporated in 1859 under the provisions of the General Law of the State of New York in force at that time, entitled "An Act to Provide for the Incorporation of Life and Health Insurance Companies and in Relation to Agencies of Such Companies," passed June 24, 1853, and amendments thereto. The charter of the defendant Society adopted in accordance with the provisions of the said law of the State of New York, appears as Exhibit A, annexed to the amended and supplemental bill of complaint herein, being part of the declaration of the Articles of Association subscribed by the Incorporators on the second day of May, 1859, and duly filed in accordance with said Laws of the State of New York. It appears therefrom that the capital of the Company was fixed at $100,000 in cash, divided into 1,000 shares of $100 each, the holders of which may receive a semi-annual dividend not to exceed three and one-half per cent. of the same. "The earnings and receipts of said Company over and above the dividends, losses and expenses, shall be accumulated" (Article III., page 2 of Record).

Article VI. of the charter provides:

> "The officers of the Company, within sixty days from the expiration of the first five years from December 31, 1859, and within the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the Company which shall exhibit its assets and liabilities, both present and contingent, and also the net surplus, after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policyholder shall be credited with an equitable share of the said surplus. Such equitable share, after being ascertained, shall be applied to the purchase of an additional amount of insurance (payable at death or with the policy itself) expressing the reversionary value of such equitable share, at such interest as the Directors may designate; or if any policyholder so direct, such equitable share of surplus shall be applied to the purchase of an annuity at such rate of interest as the directors shall designate, to be applied in the reduction of his or her future premiums. * * * The officers of the Company, within the first thirty

days after the expiration of five years from the 31st day of December, 1859, shall cause a general balance statement of the affairs of the Company to be made, which shall be open to the inspection of any policyholder for sixty days, during the usual hours of business. Said statement shall show the amounts received during the preceding five years for premiums, interest and annuities, and also the amounts paid during the same time for losses, expenses and otherwise, and the balance remaining in the treasury, together with the manner in which the same is invested." (Pages 4 and 5 of Record.)

By a law passed in 1872, Chapter 100, Laws of 1872, the Legislature enacted :

> " Any domestic life insurance corporation may ascertain at any given time, and from time to time, the proportion of surplus accruing to each policy from the date of the last to the date of the next succeeding premium payment, and may distribute the proportion found to be equitable either in cash, in reduction of premium or in reversionary insurance, payable with the policy, and upon the same conditions as therein expressed at the next succeeding date of such payment, notwithstanding anything in the Charter of such corporation to the contrary " (Page 6 of Record).

The defendant Society is now subject to the General Insurance Laws of the State of New York as embodied in the so-called " Insurance Law," Chapter 690 of the Laws of 1892, as subsequently amended from time to time, and as amended by Chapter 326 of the Laws of 1906.

Complainant claims to be the owner and holder of a policy of insurance issued by the defendant Society, to wit : Policy No. 27,175, insuring his life in the sum of $25,000, a copy of which policy is attached to the amended and supplemental bill of complaint and marked " Exhibit B." This policy provided among other things as follows :

> " 6. This policy, during its continuance, shall be entitled to participate in the distribution of the surplus of this So-

ciety, by way of increase to the amount insured, *according to such principles and methods as may from time to time be adopted by this Society for such distribution ; which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract ;* but the Society may at any time before a forfeiture, upon the request of the person holding the absolute legal title to this policy, substitute a cash payment to be fixed by said Society, in lieu of the said increase to the amount insured, and such payment may be made by reduction of subsequent premiums, if said policyholder shall so elect " (Page 6 of Record).

It appears from the allegations of the bill that the complainant " elected to receive his share of said surplus as ascertained from time to time in reduction of the premiums so due by him on the said policy, and the said Society was duly notified of said election and ratified and accepted the same, and since the date of the issuance of such policy your orator has regularly paid the premiums thereon, as they severally accrued (the times of payment having been to some extent modified by contract between himself and the said Society) less the sums which at each period the officers of the said Society stated to be the entire amount applicable in reduction of said premiums, as your orator's equitable share in said surplus " (Page 8 of Record).

It thus appears from the allegations of the bill that the Society has complied with the terms of its charter, as embodied in its contract of insurance, by distributing its surplus by way of apportionment among the policyholders, and by substituting in lieu of an increase to the amount insured in the case of complainant's policy " a cash payment," which cash payment has been " fixed by said Society in lieu of the said increase to the amount insured," and which payment has been " made by reduction of subsequent premiums " in accordance with the election of the policyholder.

It is claimed, however, by the bill and is alleged in the Fourth paragraph thereof that the amounts apportioned and allowed by the officers of the Society in reduction of the premiums " have not been the real amounts of your orator's equitable share in the true surplus." It is not, however, alleged in the bill that the complainant has not shared equitably *as between himself and the other policyholders* in the amount actually apportioned and allowed by the

Society, or that there has not been an *equitable and fair distribution* among the policyholders *inter sese*. It is claimed that " by means of the abuse of discretion, wrongs, inequitable and fraudulent conduct of the said defendant, its officers and agents, hereinafter more fully set forth, the said *Society, its officers and stockholders* have wrongfully *retained* and to the extent of a large sum *fraudulently wasted and misappropriated to themselves* as hereinafter set forth, a large portion of your orator's equitable share in said surplus." (Page 9).

It is further claimed in the bill that the complainant has accepted the reductions of premiums assigned to him solely because of his belief that the officers of the Society were acting in a just, lawful and honest manner, and in reliance upon the representations of the officers of the Society that he was receiving his lawful share of the true surplus, which representations are alleged to have been untrue and fraudulent. Here again it is not alleged that the complainant did not receive his lawful share as between himself and other policyholders of such surplus as was in fact apportioned, but it is claimed that by reason of the wrongful conduct of the officers of the defendant Society a considerable amount which should have been apportioned to the policyholders as a class by way of surplus was *retained by* the Society and its officers and *misappropriated to themselves and wasted* (Page 9).

These general allegations of paragraph Fourth of the bill are followed by four subdivisions numbered *(a)*, *(b)*, *(c)* and *(d)*. These subdivisions, however, do not in any way support the allegations of fraud or waste or wrongful misappropriation of assets. They are based on the theory that under the charter of the Society and complainant's policy of insurance it was the duty of the Board to apportion the entire net surplus of the Company among all the policyholders, and that the defendant Society failed to carry out this requirement. This theory is the same theory that was urged before the Court of Appeals of the State of New York in the case of *Greeff vs. Equitable Life Assurance Society*, 160 N. Y., 19, and was held by that Court to be unsound.

We shall discuss this theory and the effect of the decision of the Court of Appeals of New York later on in this brief when we come to the discussion of our various points. Suffice it to say here that the bill admits and alleges that the Board of Directors did ascertain and enter upon the books

of the Society at the expiration of each year "a sum alleged to be the 'net surplus' earned by the Society during the preceding year as required by its charter, * * * which surplus was ascertained by causing a balance to be struck from its books of the affairs of the Company, which exhibited its assets and liabilities, both present and contingent, and also the net surplus after deducting a sufficient amount to cover all outstanding risks and other obligations. This surplus so ascertained has been reported annually for many years past to the authorities of the State of New York and the City of New York by the defendant Society." But it is claimed that the Society has failed to comply with the requirements of its charter by crediting each policyholder with an equitable share of said surplus, but has been crediting and paying to its policyholders from time to time *only a portion of this surplus*, "to the *whole amount of which* your orator and the said policyholders of the Society were *entitled in equitable proportions.*" The bill sets forth a table showing the figures taken from the books of the Society, giving year by year the amount of outstanding assurance, the total assets, the amount of outstanding liabilities and the surplus (See pages 11 to 14 of Record).

These allegations of the bill assume the correctness of the Society's books and the Society's figures and the Society's statements, and in effect concede the correctness of the Society's apportionment of the amount actually set aside for the policyholders, but attack the right of the Directors of the Society to withhold from the policyholders and retain in the treasury of the Society any sum whatever over and above the amount stated to be "net surplus."

The fifth paragraph of the bill states the same matter in another form, but reduces the amount claimed to $10,000,000, which it states the Society had admitted to be a surplus fund, but the right of the policyholders to share in which is alleged to be disputed by the Society, and its stockholders.

Subdivision *(a)* of this paragraph refers to a suit brought by one Franklin B. Lord, a stockholder, in which he and certain other stockholders claimed certain rights in the surplus as against the policyholders, which suit is alleged to be still pending and undetermined. It is not averred in the bill that the Society has neglected to defend this suit or has neglected to take steps to protect the policyholders. [As a matter of fact, a demurrer to the amended and supplemental complaint in that suit interposed by the Society has been sustained by the Supreme Court of New York and an

appeal has been taken by the plaintiff to the Court of Appeals. See *Lord vs. Equitable Life Ass. Society*, 57 N. Y. Miscellaneous Reports, 417; 126 App. Div., 937. The relevancy, however, of this sub-division *(a)* with regard to the *Lord* suit is not apparent.]

Sub-division (*b*) contains some general language with regard to fraudulent designs and intent on the part of the Society, its officers and stockholders in failing to credit or distribute among the policyholders the whole of the surplus fund.

Paragraph Sixth of the bill states that on January 1, 1905, the directors of the Society consisted of fifty persons (naming them), of whom only ten were proprietors of five shares each of the capital stock of the Society, the other directors being only nominally owners of five shares of the stock, the actual proprietorship of which had been retained by the real owners. The relevancy of these allegations does not appear. This general statement is followed by seven sub-divisions (*a*) to (*g*), setting forth what is alleged to have taken place with regard to the affairs of the Society from the first of January, 1905, to the date of the bill, including certain investigations into the affairs of the Society by a Committee of the Board and a report made to the Board, dated June 2, 1905, a copy of which is attached to the bill and marked "Exhibit C," and an investigation made by the Superintendent of Insurance of New York State, and a report by the Superintendent dated June 21, 1905, a copy of which is annexed to the bill of complaint, marked "Exhibit D." The bill alleges that it appears by the said reports and is the fact "that the Society, its officers and agents, have been guilty of fraud waste and negligence in the management of the assurance funds held by the said Society." Various particulars are set forth in the bill.

The bill also alleges that certain directors resigned and that James H. Hyde, who owned the majority of the shares of stock of the Society sold and transferred the same to one Thomas F. Ryan who in turn executed a deed of trust dated June 15, 1905, to Grover Cleveland, Morgan J. O'Brien and George Westinghouse, a copy of which is annexed to the bill marked Exhibit E.

The bill further alleges that the selling value of the shares of stock of the Society was based upon the assumption that the stockholders would eventually receive millions of dollars as dividends from the undivided surplus.

Complainant claims that the purchase by Ryan and the trust

deed executed by him are (for some reason not clearly explained in the bill) in violation of complainant's rights, subjecting the policy of the Company and its property "to the same dangerous uses and misuses as against the interests of the present policyholders and annuitants, as have prevailed heretofore as a consequence of such majority control of said stock" (pages 10 to 23).

Paragraph Seventh of the bill sets forth:

> "The business carried on by the defendant Society has become, and is, of great magnitude, and the annual expense of conducting the same, exclusive of amounts paid to policyholders, beneficiaries of policies and annuitants, now amounts, and has for some years past amounted, to a sum averaging more than one million dollars ($1,000,000) per month,"

and that more than 75 per cent. of the disbursements of the Society is expended for the purpose of obtaining new business.

This statement is followed by four subdivisions *(a)* to *(d)*, setting forth in general terms waste and mismanagement of the funds and public distrust of the Society, which has resulted in interfering with the acquisition of new business.

It is further set forth that—

> "If truthfully stated and prudently valued and conserved the said property and assurance funds and so-called 'surplus,' together with the funds to be realized from the continuing agreements of the present policyholders to pay the future premiums to become due upon their policies, are *sufficient to provide for and liquidate every outstanding policy* of the defendant Society, even if all such policies remain in force; and such funds are *sufficient to meet all sums due or to become due upon all outstanding policies*, whether canceled, surrendered or matured; and the funds in the hands of the Society received from annuitants and set aside for this purpose are sufficient to ensure the performance of every contract made with such annuitants."

Complainant proceeds to set forth his own opinion that "there is no reasonable probability" that the efforts of the Society to obtain new insurance business "will be successful." It is not averred, however, that the Board of Directors or the officers of the Society

concur in this opinion, and the opinion of complainant has, of course, no probative value as a basis for a decree. (Pages 23 to 26.)

The Eighth paragraph of the bill sets forth that the purposes and objects provided for by the charter of the Society have become impracticable, and that the capital is grossly inadequate for the enormous business transacted by the Society (pages 26 to 27). (All of which is merely the opinion of the complainant, being of no probative value on which to base a decree.)

Paragraph Ninth reiterates the allegation that the majority of the Board are not owners of five shares of the stock as required by the Charter.

Paragraph Tenth reiterates the statements "as heretofore averred," that defendant has wilfully neglected to properly invest and reinvest its funds and has wilfully neglected and fraudulently mismanaged the affairs of the Company and has misappropriated the assets.

The Eleventh paragraph sets forth that the policyholders and annuitants of the Society number above 500,000; that the beneficiaries, direct and indirect of the policies, number millions and that there is therefore no adequate remedy at law and a suit in equity should be sustained.

The Twelfth paragraph sets forth that the defendant has books, papers, records and documents, details of which are not known to complainant and of which a discovery is necessary to enable him to prove the facts upon which right to his relief depends.

The Thirteenth paragraph avers that the rules and regulations adopted by the officers of the Society with reference to the crediting and disposition of the "net surplus" are inconsistent with the charter and contrary to the laws of the State.

The Fourteenth paragraph reiterates the statement with regard to the amount of capital of the Society and that the property of the defendant is now in the hands or under the control of the stockholders whose "representatives have been guilty of misappropriation, waste, fraud and neglect in the management of its affairs and property," and that receivers should be appointed by the Court to take charge of the assets and to "gradually, prudently and economically wind up the affairs of the Company." This Fourteenth paragraph alleges that the Society "is insolvent." This allegation, however, is based upon the allegation that the Society "is responsible in law and equity to the policyholders for excessive sums paid in the way of salaries and fees, and also for all sums

of money and damages consequent upon fraud, waste, neglect or wilful mismanagement of the property and affairs of the Society. That these sums amount at the present time to many hundred thousands of dollars in excess of the capital of $100,000 and as to which your orator and the other policyholders are entitled to an accounting, and the Society has no funds with which to meet these enormous losses, but is insolvent." In other words, if at some future time judgments should be obtained against the Society based upon charges of neglect, wrongdoing and mismanagement, and if the Society should not recoup itself by recovering from the officers or directors responsible for such wrongdoing or mismanagement, then in such case the Society might become insolvent. This falls far short of an allegation of actual insolvency. The actual situation is stated in paragraph Seventh, subdivision *(c)* (page 25), where it is in substance alleged that the funds of the Society are sufficient "to provide for and liquidate every outstanding policy of the defendant Society" and all sums due and to become due thereon. These allegations expressly negative the fact of insolvency.

The Fifteenth paragraph sets forth the jurisdictional allegation "that the matter in dispute exceeds the sum of $2,000, exclusive of interest and costs," and undertakes to sum up the reasons for granting relief in equity.

The Sixteenth paragraph is merely the formal statement that the complainant has no adequate remedy at law and is threatened with irreparable injury unless relief is granted in equity.

The prayer of the bill is as follows:

> "Wherefore your orator is entitled to relief, and on behalf of himself and the other policyholders and annuitants of the said defendant Society, prays equitable relief as follows
>
> "First. That the defendant Society produce and make discovery of all books, papers, records or documents in its possession, or under its control, or that of its officers or agents, relating to the matters aforesaid, and deposit the same in the office of the clerk for the usual purposes.
>
> "Second. That an accounting be had and taken, under the direction of the Court, of all dealings and transactions of the defendant Society, its officers, agents and stockholders, in and about said surplus and assurance funds, from the

commencement of the business of the Society, or for such other period as the Court deems proper.

"THIRD. That a trust be adjudged and declared to exist, and be imposed upon the said assurance funds and surplus as ascertained, and as alleged in the foregoing bill, in favor of the policyholders, past and present, of such Society, and against the said Society, its officers and stockholders, and that it be adjudged that they and each of them hold the same as trustees for such persons as shall be declared to have interests therein under the decree, to be entered in this cause.

"FOURTH. That it be adjudged that your orator and the policyholders and annuitants of the defendant Society, and all former policyholders or their representatives who may be entitled thereto, be credited with the full, proper and equitable share of the said surplus and assurance funds as properly ascertained upon said accounting, and that such amounts thereof as may be found to be due and payable be adjudged to be paid forthwith.

"FIFTH. That an accounting be had and taken, under the direction of the Court, of all dealings and transactions of the defendant Society, its officers, agents and stockholders, in and about the funds received and held by the Society, realized from the premiums paid by policyholders and annuitants, and the accretions thereof, and that on the taking of said account it be ascertained to what extent the said defendant Society is indebted to the said fund so derived as aforesaid, on account of damages, losses and depletions occasioned by its negligence, misconduct, misappropriations and other causes averred in the said Bill and this Amended Bill.

"SIXTH. That it be adjudged that the defendant Society pay into the said assurance fund the amount ascertained on said accounting to be due from the said defendant Society to the said fund.

"SEVENTH. That the defendant Society, its directors, officers and agents, pending this suit and forever thereafter, be enjoined from further retaining or controlling or expending in any way the said funds received from the policyholders and annuitants, and the accretions thereof, and constituting the assurance funds and so-called surplus of the

Society, or with the funds and investments representing the original capital of the Society, or from doing any other act or thing in connection with the same, except to transfer the same to a receiver or receivers to be appointed by this Court.

"EIGHTH. That a receiver or receivers be appointed by this Court to take possession of all the funds, assets and property held by the defendant Society of every character and description, and administer the same as they may be directed by the Court.

"NINTH. That your orator have such other, further or different relief as may in the premises or in the further progress of this suit appear to be just and equitable."

From the mass of verbiage contained in the bill, and leaving out of view the conclusions of law and the opinions of the pleader, and the denunciatory epithets and vituperative adjectives and adverbs with which the draughtsmen of bills in equity frequently endeavor to conceal the paucity or absence of the proper or necessary allegations of fact to support the prayer of the bill, we find the substantial allegations of the bill to resolve themselves into the following:

1. The defendant Society has failed to comply with its charter and its contract obligations by failing to apportion among the policyholders its entire net surplus.

2. The defendant's officers and directors, or some of them, have been guilty of waste and misappropriation of assets and mismanagement of the affairs of the Society, by reason of which the surplus has been diminished.

We repeat that, when sifted of all immaterial and irrelevant matter, there remain substantially but these two allegations on which to support the bill.

We proceed to discuss the principles of law applicable to the case and we submit that this suit cannot be sustained as a suit in equity on either of the two sets of allegations on which the bill is based. It is to be noted that the complainant is not the holder of a tontine policy and does not claim to be interested in any special fund held by the Society for the benefit of any special class of policies. He claims only such rights as an ordinary life policyholder has to share in the divisible surplus of the Society in accordance with the general provisions of the charter and of his contract. It is also to be borne in mind that by the terms of his contract contained

in his policy of insurance, he has agreed that his right to participate in the distribution of the surplus is to be "according to such principles and methods as may from time to time be adopted by this Society for such distribution, *which principles and methods are hereby ratified and accepted* by and for every person who shall have or claim any interest under this contract". (See paragraph 6 of Provisions of policy, at p. 47 of Record.)

This cause came on to be heard in the United States Circuit Court for the Southern District of New York before HAZEL, District Judge, upon the demurrer of the defendant, and after argument, he sustained the demurrer and dismissed the bill. His opinion appears at pages 59 to 74 of the Record. In addition to the *Greeff* case, already referred to, he calls attention to the principles laid down in *Bewley vs. Equitable Life Assurance Society*, 61 How. Pr., 344, and numerous other cases, and in *Uhlman vs. New York Life Ins. Co.*, 109 N. Y., 421, to the effect that there is no trust relation existing between an insurance company and its policyholders, and that their relations are purely those of contract. An appeal was taken by the complainant to the United States Circuit Court of Appeals for the Second Circuit, which Court, after argument, reversed the decision of the Circuit Court and overruled the demurrer. The opinion is *per curiam* and is found at pages 102 to 106 of the Record with a short concurring opinion by LACOMBE, Circuit Judge, at page 106*a* of the Record.

The Circuit Court of Appeals, while professedly following the decisions of the New York Court of Appeals in the *Greeff* case and the *Uhlman* case, quotes from the opinion of Mr. Justice PECKHAM in the *Uhlman* case, a *dictum*, on the basis of which *dictum* the Court held this suit maintainable on the ground that there are in this suit allegations of "misappropriation or wrongdoing." Judge LACOMBE in his concurring opinion says:

> "In recording concurrence with the conclusion of the majority of the Court, I am not to be understood as expressing or intimating an opinion upon any of the questions raised and argued upon the appeal, except the single one that because the bill contains express and specific charges of fraud the case is brought within the class pointed out in the Uhlman case and cannot be thrown out upon a general demurrer as not stating facts sufficient to constitute a cause of action."

We claim and shall hereafter discuss the proposition that the Circuit Court of Appeals misapprehended and misapplied the dictum in the *Uhlman* case and that this suit is not sustainable under that decision.

It may be observed incidentally that after the decision of the *Uhlman* case, and apparently to embody the decision in legislative form an act was passed by the Legislature amending the Insurance Law so as to prohibit suits for accounting, except by the authority of the Attorney General (Section 66 of the Insurance Law, Chapter 400, Laws of 1890). This statute was approved and followed by the Court of Appeals in *Swan vs. Mutual Reserve Fund Association*, 155 N. Y., 9, and *Greeff vs. Equitable Life Assurance Society*, 160 N. Y., 19.

Pending the present suit this statute has been, however, repealed, leaving this suit to stand or fall upon the law as it stood at the time of the Uhlman suit before the prohibitory statute.

ASSIGNMENT OF ERRORS.

The United States Circuit Court of Appeals for the Southern District of New York erred in the following particulars:

FIRST. In reversing the decree of the Circuit Court for the Southern District of New York sustaining the defendant's demurrer to the bill of complaint herein.

SECOND. In overruling so much of said demurrer as set forth "that said bill does not contain any matter of equity whereon this Court can ground any decree or give to the complainant any relief against this defendant."

THIRD. In overruling so much of said demurrer as set forth "that said bill discloses that complainant has an adequate remedy at law for any cause of action he has against defendant."

FOURTH. In overruling so much of said demurrer as set forth "that complainant has no interest in the subject matter of said bill."

FIFTH. In overruling so much of said demurrer as set forth "that complainant's said bill does not disclose facts sufficient to entitle him to the relief prayed for therein."

SIXTH. In overruling so much of said demurrer as set forth "that there is a want of proper parties defendants, in that the officers and directors of defendants are not made parties to said bill."

SEVENTH. In overruling so much of said demurrer as set forth "that there is a want of proper parties defendant, in that the stockholders of defendant are not made parties to said bill."

EIGHTH. In overruling so much of said demurrer as set forth "that complainant's said bill is multifarious, in that there are joined therein several and distinct and independent grounds of equitable relief, including an alleged cause of action for an accounting, and an alleged cause of action for an injunction, and the appointment of a receiver to take the administration of defendant's property and business out of the hands of this defendant, its officers and agents."

POINTS.

PRELIMINARY POINT.

(*a*) *A demurrer does not admit the correctness of conclusions of law.*

"The final allegation, that by reason of the causes aforesaid, the defendant is indebted and liable to the plaintiff, is a mere conclusion of law, which is not admitted by demurrer or default (Hollis vs. Richardson, 13 Gray, 392)."

Cragin vs. Lovell, 109 U. S., 199.

"It is said that the bill alleges, as a matter of fact, that the exemption passed to and vested in the complainant below, and that the truth of the allegation is admitted by the demurrer. But this is matter of law; the documents of title

are exhibited with the bill and constitute part of the record; and we take judicial notice of their legal effect. A fact impossible in law cannot be admitted by a demurrer. In Wilson v. Gaines, 103 U. S. 417, it was inferred in the face of a demurrer, claimed to be an admission of a contrary allegation, that the sale did not pass any rights of property not described as within the lien of the mortgage."

Louisville & Nashville R. R. Co. vs. Palmes, 109 U. S., 253.

"Mere averments of a legal conclusion are not admitted by a demurrer unless the facts and circumstances set forth are sufficient to sustain the allegation."

Gould vs. Evansville, etc., R. R. Co., 91 U. S., 536.

See also cases cited under following subdivisions.

(b) Where written instruments are set forth and annexed to the complaint a demurrer does not admit the construction placed by the pleader upon such instruments, nor conclusions or inferences drawn by the pleader therefrom. It is for the Court to decide whether the construction placed by the pleader upon the instruments, or the conclusions or inferences of the pleader are correct.

"In interposing the demurrer the defendant did not thereby admit the construction put upon the contract by the pleading demurrer to, or the correctness of inferences, drawn from the facts admitted, but only the truth of such facts as were properly stated therein (Bonnell v. Griswold, 68 N. Y., 294; Buffalo Catholic Inst. vs. Bitter, 87 *id.*, 250). The contract itself having been set forth the rights of the parties must be determined by the terms of that instrument as construed by the Court."

Bogardus vs. N. Y. Life Ins. Co., 101 N. Y., 337.

To same effect

Greeff vs. Equitable Life Assurance Soc., 160 N. Y., 19.

"Matters of fact well pleaded are admitted by a demurrer, but it is equally well settled that mere conclusions of law are not admitted by such a proceeding. Dillon v. Bar-

nard, 21 Wall., 430; Ford v. Peering, 1 Ves. Ch., 71; Lea v. Robeson, 12 Gray (Mass.), 280; Redmond v. Dickerson, 1 Stockt. (N. J.), 507; Murray v. Clarendon, Law Rep., 9 Eq., 17; Nesbitt v. Berridge, 8 Law Times, N. S., 76; Story, Eq. Plead. (7th Ed.), sec. 452.

"Facts well pleaded are admitted by a demurrer; but it does not admit matters of inference or argument, nor does it admit the alleged construction of an instrument when the instrument itself is set forth in the record, in cases where the construction assumed is repugnant to its language. Authorities to that effect are numerous and decisive; nor can it be admitted that a demurrer can be held to work an admission that parol evidence is admissible to enlarge or contradict a sealed instrument which has become a matter of record in a judicial proceeding. Peckham v. Drake, 9 Mee. & W., 78; Humble v. Hunter, 12 Law Rep., Q. B., 315; McArdle v. The Irish Iodine Company, 15 Irish C. L., 146; Sprigg v. Bank of Mount Pleasant, 14 Pet., 201."

U. S. vs. Ames, 99 U. S., 45-6.

"A demurrer admits facts well pleaded, but does not admit that the construction of a written instrument set forth in the bill is the true one, or that its legal effect is contrary to that which its language imports. The very object of a demurrer in such case is to submit the question presented by the instrument as a matter of law for the determination of the court. Story's Eq. Pl. (9th Ed.), Sec. 452, note *a*; Dillon v. Barnard, 21 Wall., 430, 437; United States v. Ames, 99 U. S., 35, 45."

Interstate Land Co. vs. Maxwell Land Co., 139 U. S., 577-8.

"We do not take this view of the answer. It abounds in recitals, in statements of what papers made exhibits thereto purport to show, and in conclusions of law, which are not admitted by the demurrer, the rule being well settled that only matters of fact well pleaded are admitted by a demurrer, while conclusions of law are not. United States v. Ames, 99 U. S., 35, 45; Interstate Land Co. v. Maxwell Land Grant Co., 139 U. S., 569, 578."

Chicot County vs. Sherwood, 148 U. S., 536.

See also language of Mr. Justice PECKHAM in *Finney vs. Guy*, 189 U. S., 343, 344.

(c) Opinions of the pleader as to the propriety of defendant's conduct or as to what is or is not the probable consequence of such conduct are not admitted by a demurrer and are of no probative value.

This is a self-evident proposition and follows from the principles laid down by the foregoing authorities.

(d) General allegations of fraudulent or negligent conduct, or wrongful intent are to be disregarded upon demurrer, unless facts are alleged sufficient to substantiate the allegations.

> "But whether it be a charge of omission or commission the facts are not alleged, and a mere charge of negligence whether of omission or commission is charging a legal conclusion which is not admitted by the demurrer. (Knowles v. City of N. Y., 176 N. Y., 430; Talcott v. City of Buffalo, 125 *id.*, 280; Thomas v. N. Y. & G. L. R. Co., 139 *id.*, 163, 182; O'Brien v. Fitzgerald, 6 App. Div., 509, 513; Franklin Fire Ins. Co. v. Jenkins, *supra*; Van Schaick v. Winne, 16 Barb., 89; Kranz v. Lewis, *supra*)."
>
> *People vs. Equitable Life Assurance Soc.*, 124 N. Y. App. Div., 732.

Allegations of fraud, unsupported by facts fairly tending to sustain the charge, are insufficient.

Schiefer vs. Freygang, 125 N. Y. App. Div., 498.

POINTS.

I.

This society, being a corporation of the State of New York, organized under the laws of New York, the decisions of the highest Court of that State, construing its charter and determining the rights of policyholders under the charter and under the laws of the State, will be followed by this Court as authoritative and indeed conclusive where no question arising under the statutes or Constitution of the United States is involved.

(a) That such is the settled rule where questions of the proper construction of state statutes in general come before this Court is, of course, so well known as not to require discussion (U. S. R. S., Sec. 721, *Elmendorf vs. Taylor*, 10 Wheat. (23 U. S.), 153, 159; *United States vs. Morrison*, 4 Pet. (29 U. S.), 124, 137; *Green vs. Neal*, 6 Pet. (31 U. S.), 291; *Comm'rs of Wicomico Co. vs. Bancroft*, 203 U. S., 112, 118).

(b) A charter granted by special act to a corporation is simply a particular kind of statute. Therefore, the Federal Courts hold themselves bound to follow the interpretation placed upon a corporation charter contained in an Act of the Legislature by the highest court of the state which enacted it *(Smith vs. Kernochan*, 7 How. (48 U. S. 198; *Stone vs. Wisconsin*, 94 U. S., 181; *Cleveland, P. & A. R. Co. vs. Franklin Canal Co.*, 5 Fed. Cas. No. 2, 890; *Venner vs. Atchison T. & S. F. R. Co.*, 28 Fed., 581; *New Orleans W. W. Co. vs. Southern Brew. Co.*, 36 Fed., 833).

In *Smith vs. Kernochan*, this Court speaking through Mr. Justice NELSON, 7 How., at page 219, said:

> "There is another principle that would, probably, be decisive of this case, over and above the ground here stated, upon a second trial, arising out of the thirty-fourth section of the Judiciary Act, which provides that the laws of the

several States, with the exceptions there stated, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.

"*The highest court in the State of Alabama has given a construction to the act of the legislature chartering this company*, which we have seen is fatal to a recovery. It belongs to the State courts to expound their own statutes; and when thus expounded *the decision is the rule of this court* in all cases depending upon the local laws of the State (7 Wheat., 361; 6 Pet., 291)."

In *Stone vs. Wisconsin*, Mr. Chief Justice WAITE, delivering the opinion of this court on appeal from one of the circuit courts, said (94 U. S., 181–183):

"The only question presented in this case, not decided in Chicago, Milwaukee & St. Paul Railroad Co. v. Ackley, *supra*, p. 179, is as to the effect upon the rights of these parties of the charter of the Milwaukee and Waukesha Railroad Company, passed by the territorial legislature of Wisconsin, March 11, 1847." * * *

"Upon this state of facts the Supreme Court of Wisconsin decided, in the case of The Attorney-General v. Railroad Companies, 35 Wis., 599, 'that the charter was accepted and the corporation organized many months after the adoption of the Constitution and the admission of the State into the Union by Congress.'" * * *

"The ground on which the decision was placed is that, as the act of incorporation had not been accepted when the territory ceased to exist, there was no contract between the corporation and the territory; but the State Constitution having continued the act in force, it became thereafter a State statute for the incorporation of the company, and, as such, subject to the reserved power of alteration and repeal. This construction of the statute and Constitution is binding upon us as a question of the State statutory and constitutional law."

FIELD and STRONG, JJ., dissented on the ground that the legislature had violated contract rights, but they did not discuss the effect of the Wisconsin court's decision.

In *Venner vs. Atchison Railroad*, BREWER J., in the Circuit Court for the District of Kansas, said (28 Fed., pp. 582–586):

"The first inquiry runs to the question of power. The primal source of power is, of course, the defendant's *charter*. * * * It would seem that there could be little question of the power of the defendant company to acquire the control of the Gulf Company by the purchase of its stocks and bonds, or either, and, with the control, assume all the responsibilities of control. This conclusion is in harmony with the recent decision of the supreme court of this state in the case of *Sante Fe, etc., R. Co. v. Fletcher, supra.*

"Indeed, if this *Fletcher Case* be accepted as controlling in this court, there would be little need for any personal examination of the question. But counsel for complainant earnestly insist that it is not controlling, and should not be followed. They urge that it was rendered after complainant, a non-resident, had acquired his interest in the property, and may therefore not be invoked in the federal court to his detriment; that it was not rendered upon a final hearing, but only upon an application for a preliminary injunction,—was therefore possibly not carefully considered, and may be changed by that tribunal upon the final hearing; and, finally, that it is contrary to the general course of decision elsewhere, and is not a correct declaration in respect to corporate charters and powers. * * * I must dissent, in the main, from these views. That decision, if not absolutely controlling, is certainly most persuasive in this court. * * * *The question is settled.* Examination of the opinion shows that it was carefully prepared, and had received that full examination at the hands of the court which its importance deserves. *It has become the law of the matter for the state tribunals. As such, very cogent reasons should exist before any federal court should be at liberty to disregard it.* It contains an interpretation of the statutes of the state by its highest tribunal. It declares what powers the state has given to one of its corporations; and, *when a state affirms that it has granted certain powers to one of its creatures, it would be something of an anomaly for the courts of another jurisdiction to declare that it has granted no such powers.* * * * *The question involved is not a federal question*, and

cannot, therefore, be taken from the state to the United States Supreme Court for review. *Unless the Federal tribunals follow in this matter, the rulings of the state supreme court, there will inevitably be two opposing lines of decision. Very little reflection will show to what confusion and injustice such conflict will lead.*"

"*Certain am I, at least, that I should follow it unless I was very clearly convinced that it was erroneous, and in this I but listen to the voice of the United States Supreme Court.* In the recent case of *Burgess v. Seligman*, 107 U. S., 20, S. C. 2, Sup. Ct. Rep. 10, in which that court enunciated, perhaps, its most extreme views as to the duty of independent judgment by the federal tribunals, I find this cautionary language:

"'But even in such cases, for the sake of harmony and to avoid confusion, the courts of the United States will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles of comity, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts.'"

In *Water-works Co. vs. the Brewing Co.*, PARDEE, J., in the Circuit Court for the Eastern District of Louisiana, followed this rule in an extreme case, saying (36 Fed., pp. 834-836):

"In the case of Water-Works Co. v. Refinery Co., 35 La., Ann. 1111, this question of the authority of the city of New Orleans under the complainant's charter and the laws of the state was presented to the supreme court of the state of Louisiana, and was decided in favor of the right." * * *

"The decision of the supreme court of the state was rendered in 1884. In 1885 the precise question was before the supreme court of the United States in the case of Water-Works v. Rivers, and was then decided in favor of the water-works company." * * *

"In the decision no reference whatever is made to the decision of the supreme court of Louisiana upon this very question, conceded to be not a federal question, but one

wholly depending upon local Louisiana law. See Water-Works Co. v. Rivers, 115 U. S., 674, 6 Sup. Ct. Rep. 273."

"The question is thus squarely presented whether, in a matter involving solely Louisiana law, where no property rights under former decisions are involved, this court should follow the decision of the highest court of the state or the decision of the supreme court of the United States. This same question was presented to the supreme court of the United States in the case of Fairfield v. County of Gallatin, 100 U. S., 47. In 1874 in the case of Railroad Co. v. Pinckney, 74 Ill., 277, the supreme court of the state of Illinois gave a certain construction to a provision of the constitution of the state. About one year afterwards, in Town of Concord v. Portsmouth, 92 U. S., 625, the same constitutional provision came before the supreme court of the United States, and received a contrary construction, the case of Railroad Co. v. Pinckney not being called to the attention of the court. In Fairfield v. County of Gallatin, *supra*, the same question was again brought before the supreme court of the United States, the defendant in error relying upon, and the court below having followed, Town of Concord v. Portsmouth, *supra*, and it was then held, reversing the circuit court, and citing Polk's Lessee v. Wendal, 9 Cranch, 87; Nesmith v. Sheldon, 7 How., 812; Walker v. Commissioners, 17 Wall., 648; Elmendorf v. Taylor, 10 Wheat., 152; Green v. Neal's Lessee, 6 Pet., 291; Leffingwell v. Warren, 2 Black, 599; Summer v. Hicks, *Id.*, 532; Olcott v. Supervisors, 16 Wall., 678; and State Railroad Tax Cases, 92 U. S., 575, that it is the general rule of decision to follow and adopt the decisions of the state courts in the construction of their own constitution and statutes when that construction has been settled by the decisions of its highest tribunal; and that this rule of decision is to be followed even where the supreme court of the United States has given a different construction to the state law, provided no rights are affected which have been acquired under their former decisions. See, also, Suydam v. Williamson, 24 How. 427. * * * In a matter so important to the public, and where the action of the city council of New Orleans cannot be restrained *uniformity in the jurisprudence which determines the value of the permits or licenses granted is very*

desirable, and the rights of the party who receives a license should not wholly depend upon the selection made by the water-works company of the court (state or federal) to hear the cause. *This desirable uniformity is better attained by following the long line of decisions of the supreme court of the United States declaring that the federal courts should adopt and follow the decisions of the highest court of the state in the construction of its own constitution and statutes, than in following one decision of the supreme court on what is now conceded not to be a federal question.*"

BILLINGS, J., dissented from this opinion but explicitly conceded the point with which we are here concerned. He said in part (at p. 838):

> " Complainant submits as his case that by the legislative action of the state the obligation of his contract is impared. * * * This, therefore, is not a cause where the construction of a charter by the court of last resort of a state is necessarily a part of the charter, and conclusively binding. * * * While *I agree* with the circuit judge that the construction by the state supreme court is contrary to that by the United States supreme court in the *Rivers Case*, and *that with reference to every other class of cases the construction of a charter by the state court of last resort would be obligatory upon the United States supreme court*, and upon this court, I nevertheless think that the views of the supreme court in the *Rivers Case* should still control."

(c) The same principle applies to the construction of " Articles of Incorporation " drawn up under a General Statute authorizing the incorporation of certain classes of corporations.

The corporate rights and liabilities growing out of such Articles are to be determined by the Courts of the State under whose laws the Corporation is organized.

In *Polk vs. Mutual Reserve* (C. C. S. D., N. Y.), the defendant association had been incorporated under general laws. The complainants contended that a certain change in the plan of insurance made by the directors was a violation of their rights as members of the corporation. HAZEL, D. J., said (137 Fed. at page 276):

"* * * That the rights of the policyholders and the insurer must be ascertained and determined in connection with the constitution and by-laws of the company and the certificates of insurance, which constitute the contract between the parties, will not admit of serious dispute. * * * *The decisions of the highest courts of the state upon this question are of controlling authority.*"

The decision in that case was affirmed by this Court in 207 U. S., 310.

Merrimac Mining Co. vs. Levy, although in a state court, rests upon the same principles as govern the Federal courts on this general question. The opinion of the Court, by STRONG, J., shows clearly these principles and their application to such a case as the present one. The opinion reads in part as follows (54 Pa. St. 227, *et seq.*) :

"The plaintiffs are a Michigan corporation, and this suit is brought to recover from the defendant, who is a transferee of stock from an original subscriber, the instalments on the stock called since he became a stockholder. In Carson v. The Arctic Mining Company, 5 Michigan, 288, it was ruled that one who had signed the original *articles of association*, and thus subscribed to the stock of a mining company organized under a law similar to that under which these plaintiffs are organized, is liable personally for instalments called while he remains a stockholder. And in a later case, decided by the same court, The Merrimac Mining Company v. Bagley, it was held, that one who had purchased stock in the company from an original subscriber, is liable to pay such instalments as are called while he owns the stock. In this latter case the law of incorporation was the same as that of the company under which the defendant held his stock. Indeed, the plaintiffs in that case and this are the same. If the decision of the Michigan court is a correct exposition of the law, the judgment in this case should have been for the plaintiffs.

"We do not propose now to spend time in showing that were the defendant an original subscriber to the stock of the plaintiffs, he would be personally liable for the instalments called. It is quite plain, from the articles of association,

taken in connection with the general mining law of Michigan, that he would.

* * * * * * *

"It is argued, however, that the past decisions of this court show the law to be otherwise with us, and we are referred to Canal Co. v. Sansom, 1 Binn., 70.

* * * * * * *

"Palmer v. The Ridge Mining Co. is also cited; it is found in 10 Casey, 288. It certainly does bear a strong resemblance in many of its features to the present case.

* * * * * * *

"*But here we have a company chartered under another law, and a law which has received a construction from the tribunal of last resort in the state that made it. In determining the duties and obligations of stockholders in this company, we think we ought to be guided by the ruling of the Michigan court.* If we are not, this anomaly will be produced: some stockholders will be bound to pay instalments called, and others standing in the same condition will not. Such a state of things would be unjust to those who are obliged to pay, and unjust to the creditors, if any, of the corporation. *As this is a Michigan charter, existing only under the laws of that state, the decisions of Michigan courts are the best evidence of the rights and duties of stockholders under it.*"

In *Clark vs. Turner*, the Georgia Supreme Court called the incorporating instrument a "charter," although it was not a direct legislative enactment, but was to all intents and purposes the same sort of thing as the "charter" of this insurance society. JACKSON, C. J., said (73 Ga., 1):

"It seems clear from the evidence that the stock was limited to one hundred thousand dollars in the application for and grant of the *charter under the general laws of Alabama*, by the proper court of that state. There was some sort of reservation of the right to issue more in this application, but nothing was done by the court in respect thereto, nor was any authority granted to the corporation to issue more, under the laws of Alabama.

"Indeed, in the case of this same company against Kampes *et al.*, decided by the Supreme Court of Alabama at

> the December term, 1882, it was held that, under the general law of Alabama and the amendments thereto and the charter of this company by the Mobile court, there was given it no power to go beyond the sum of one hundred thousand dollars; that the issue of stock beyond that amount was *ultra vires* and void, and consequently that the subscription beyond that sum could not be collected. * * * For the first time this point is now made in this court, and, as seen above, *the judgment by the Supreme Court of Alabama, in the case of this company vs. Kampes et al., supra, absolutely controls and concludes this case*, that judgment being a construction of the power of an Alabama corporation under its statutes."

In *First National Bank vs. Converse*, 200 U. S., 425, the opinion of the court by Mr. Justice WHITE quotes at length from an opinion of the Minnesota Supreme Court construing the articles of association of a thresher company against whose stockholders the plaintiff was seeking to enforce a double liability. After summing up the views of the state court, Mr. Justice WHITE, without discussing the question whether the construction of the state court was binding on this court, simply says: "Accepting this construction," and then goes on to enforce the conclusion to which that construction led.

(d) That the Supreme Court should, for the sake of consistency and sound principles, declare itself bound by the decisions of the New York Court of Appeals construing this society's charter is clear from the many previous cases in which this Court and the lower United States Courts have had occasion to consider the organization and powers of corporations created by the various states. The purport of all these cases is that such questions are questions of "local law," concerning which the Federal Courts are not called upon to form an independent opinion. Whether this course of decision depends upon the rule that state "statutes" are to be construed by the state courts or upon the principle that this Court will not overturn an established "rule of property" or simply upon reasons of "comity," the fact is that the United States Courts have invariably followed the state decisions on all questions concerning corporations, where no Federal question was involved. (See 11 Cyc., 903–907.)

Typical of such cases are the following: *Secombe vs. Railroad Company*, 23 Wall. (90 U. S.), 108; *Hancock vs. Louisville Railroad*

Co., 145 U. S., 409; *Park Bank vs. Remsen*, 158 U. S., 337; *Sioux City Railroad Co. vs. N. A. Trust Co.*, 173 U. S., 99; *Williams vs. Gaylord*, 186 U. S., 157; *Schofield vs. Goodrich Bros. Banking Co.*, 39 C. C. A., 76; 98 Fed., 271.

In *Secombe vs. the Railroad*, on error to the Circuit Court for the District of Minnesota, Mr. Justice DAVIS, delivering the Supreme Court's opinion, said (23 Wall. at p. 117):

> "Whether the Minnesota Central Railroad Company, under whom the defendant claims—and which occupied for railroad purposes the land in question long before the deeds of quitclaim under which the plaintiff sets up title were made—*whether this company had the right to condemn the land and took the proper steps to condemn it, depends of necessity on the laws of the State; and if these laws have been construed by the highest court of the State in a case similar in character to the one before us, the Federal Courts are relieved of all difficulty.*
>
> "We do not feel called upon to enter into an examination of the several acts on this subject, both public and private, which are quite numerous, in order to show that the Minnesota Central Company had a corporate existence, and was therefore capable of performing an act of condemnation. It is enough to say that the point is settled in favor of the company by the decision and reasoning of the Supreme Court of Minnesota in St. Paul and Pacific Railroad Company v. Parcher."

In *Hancock vs. The Railroad*, also on appeal from one of the Circuit Courts, this Court, speaking through Mr. Justice BREWER, said (145 U. S., pp. 414, 415):

> "This precise question was presented to the Court of Appeals of Kentucky, in a consolidated action to which certain taxpapers—the Shelby Railroad Company and the 'Shelby Railroad District of Shelby County'—were parties (Kreiger v. Shelby Railroad Co., 84 Kentucky, 66), and by that court decided in favor of the right of the district to vote the stock. * * * The Court of Appeals held that a corporation was, in fact, created by the act of 1869, granting authority to a defined portion of Shelby County to subscribe

stock and vote bonds; that that corporation, by virtue of the subscription and issue of the bonds, became the owner of the stock; and that the acts of 1870 and 1873 simply prescribed who should represent the corporation, and by what name it should be known. Counsel criticise this ruling severely, asserting that corporations are never created by implication, and that there is in the act of 1869, in terms, no attempt to create one. But *this is a matter of a purely local nature.* A corporation may be formed in any manner that a State sees fit to adopt; and, *when the highest court of a State decides that, by certain legislation, a corporation has been created, such decision concludes not only the courts of the State, but also those of the United States.* It is a matter over which we have no review, and in respect to which the decision of the state court is final."

In *Park Bank vs. Remsen*, Mr. Justice BREWER, delivering the opinion of this Court, expressed the general principle, which applies to the present case, in very forcible language, saying (158 U. S., at p. 342):

"The highest court of the State which incorporated the warehouse company and in which it is situated, has ruled, in a direct action against it, that it did not become indebted to the plaintiff by reason of its endorsement. The liability of the defendants is not primary and that of a debtor, but secondary and depends altogether upon a statute of that State of a penal character, which declares that, upon certain omissions of duty on the part of a trustee, he shall become responsible for the debts of the company. Can the Federal Courts ignore the decision of the Court of Appeals, and, in face of its unanimous opinion that the warehouse company is not indebted, compel the defendants to pay as a debt of the company that which has been thus decided to be no debt? Or, to state the proposition in another way: a statute of the State imposes a liability on a trustee for the debts of the company, of which he is trustee. The highest court of the State says there is no debt, and therefore no liability. Is it appropriate for this court to hold that there is a debt, and, by reason thereof, a liability?"

The decision affirmed that of the Circuit Court for the Southern District of New York, 43 Fed., 226, where COXE, J., said:

> "In October, 1889, the court of appeals of New York, in an action brought against the warehousing company upon these identical notes, held that there was no liability, for the reason that an accommodation indorsement by the warehousing company was *ultra vires* and that the plaintiff was chargeable with notice of the character of the indorsement, because the notes were presented for discount by the makers, who received the avails thereof. National Park Bank v. German-American, etc., Co., 116 N. Y., 281; 22 N. E. Rep., 567. This decision sets at rest forever the question of the liability of the warehousing company upon these notes. They can never be enforced against that company and it is certainly a grave question whether, in any view, a trustee can be held upon an obligation from which his corporation is, in fact, released. But the highest tribunal of this state has decided that the notes never were an obligation of the warehousing company. In order to hold the defendant liable it is necessary for this court to disregard that decision. Although the power to do this may be conceded, it is only in exceptional cases, where there is a conflict between federal and state authority or where important public considerations are at issue, that it should be exercised. Even where the question is one of general commercial law considerations of comity and the orderly administration of justice are against the assertion of the power."

In the *Sioux City Railroad* case this Court, per Mr. Justice WHITE, said (173 U. S., pp. 106, 107, 111, 112):

> "The portion of the *charter* of the Terminal Company fixing, *in obedience to the statutory requirement*, the amount of the debt which could at any one time exist was as follows:
>
> "'The highest amount of indebtedness to which this (Terminal) company shall at any time subject itself shall not exceed two thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company.'
>
> "As the sum of the bonds which were issued and secured by the mortgage in favor of the Trust Company of North

America exceeded the statutory limit and the amount stated in the charter, the question which arises first for consideration is this : Did this fact render them void ; and, secondarily, was the issue of bonds taken from out the operation of the general rule laid down in the statute by the exceptions mentioned in the latter portions thereof? * * * In making this inquiry we are constrained in the first place to inquire what construction has been placed upon the Iowa statute by the Supreme Court of that State, for it is an elementary principle that this court in interpreting a state statute will construe and apply it as settled by the court of last resort of the State, and will hence only form an independent judgment, as to the meaning of the state law, when there was no binding construction of such state statute by the court of last resort of the state. Nobles v. Georgia, 168 U. S. 398 ; Aberdeen Bank v. Chehalis County, 166 U. S. 440 ; Morley v. Lake Shore and Mich. South. Railway Co., 146 U. S. 162, 166, and authorities there cited * * *.

" The argument, then, reduces itself to this : Although it was conclusively settled by the decisions of the State of Iowa at the time the contract in question was entered into, that a debt contracted by a corporation in excess of the statutory limitation was in no sense of the word void but on the contrary was merely voidable, that we nevertheless should, in enforcing the state statute, disregard the construction affixed to it by the Supreme Court of the State of Iowa, and hold that the act of the corporation in exceeding the limit of debt imposed by the statute or fixed in the charter in compliance with the statute was absolutely void. But to so decide would violate the elementary rule previously referred to, under which this court adopts and applies the meaning of a state statute as settled by the court of last resort of the State. * * * *Whether, as an independent question, if we were enforcing the Ohio statute, we would decide that the issue of stock by a corporation in excess of a statutory inhibition was not void but merely voidable, need not be considered,* since, as we have said, in applying an Iowa law, *we follow the settled construction given to it by the Supreme Court of that State.*"

The opinion of the court below in that case (27 C. C. A., 73 ; 82 Fed., 124) gives the rule of the decision clearly and emphatically. It also incidentally shows how impossible it is to distinguish between the construction of a state statute and the construction of articles of incorporation filed under a state statute—how impossible it is to determine where the one begins and the other ends. SANBORN, Circuit Judge, says :

> " *When the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations created under its laws, that decision is conclusive in the national courts in all cases in which no question of general or commercial law and no question of right under the constitution of the United States is involved.* Madden vs. County of Lancaster, 27 U. S. App., 528, 536, 12 C. C. A., 566, 570, and 65 Fed., 188, 192 ; Dempsey vs. Township of Oswego, 4 U. S. App., 416, 2 C. C. A., 110, and 51 Fed., 97 ; Rugan vs. Sabin, 10 U. S. App., 519, 3 C. C. A., 578, and 53 Fed., 415 ; Travelers' Ins. Co. vs. Township of Oswego, 19 U. S. App., 321, 330, 7 C. C. A., 669, 673, and 59 Fed., 58, 61 ; Claiborne Co. vs. Brooks, 111 U. S., 400, 410, 4 Sup. Ct., 489 ; Bolles vs. Brimfield, 120 U. S., 759, 763, 7 Sup. Ct., 736 ; Detroit vs. Osborne, 135 U. S., 492, 499, 10 Sup. Ct., 1012.

In *Williams vs. Gaylord*, the opinion of this Court, affirming the decision of the Circuit Court of Appeals for the Ninth Circuit, clearly shows that the rule giving conclusive effect to the construction of state statutes by the respective state supreme courts should not be viewed narrowly, but must be held to include the " applying " as well as the "construing " of such statutes. Mr. Justice MCKENNA said in part (186 U. S., 162–164) :

> " To sustain this proposition the petitioner makes a distinction between the construction of the statute and its application, conceding the binding force of the state decisions as to the former but denying their authority as to the latter.
> * * *
>
> " Counsel for petitioner says that the Supreme Court in its opinion not only construed but applied the act of 1880—

construed it in that portion of the opinion which denied authority to directors of mining corporations to convey mining property without the consent of the stockholders; applied it in that portion of the opinion which declares that without the consent of the stockholders the title of mining property does not pass, and that 'the question can be raised by any one who connects himself with the title of the corporation, * * * as well as by the stockholders thereof.' * * *

"We are unable to accept the distinction. To accept it would deprive the state courts of the power to declare the implications of state statutes, and confine interpretation to the mere letter. The Supreme Court of California declared the effect of the act of 1880 as deduced from the language and purpose of the act, and this was necessarily an exercise of construction. The very essence of construction is the extension of the meaning of a statute beyond its letter, and it can seldom be done without applying some principle of law general in some branch of jurisprudence, and if whenever such application occurs the authority of the state courts to interpret the statute ceases, the Federal tribunals, instead of following, could lead those courts in declaring the meaning of the legislation of the States."

In *Schofield vs. the Banking Co.* SANBORN, Circuit Judge, writing the opinion of the Circuit Court of Appeals in the Eighth Circuit, well says (98 Fed.. at p. 273):

"The decision of the supreme court of Nebraska is a construction of the statutes of that state under which the defendant in error is organized, and it is an elementary principle that the federal courts will construe and apply such statutes as they are interpreted by the highest judicial tribunal of the state which enacts them, when no question of general or commercial law and no right under the national constitution or laws is involved. *There is no class of cases where they follow, and for obvious reasons ought to follow, the decisions of the state courts more implicitly than that in which these courts define and limit the powers of corporations created under the statutes of their respective states.* What a medley of contradiction, confusion, and conflict

would result if such corporations could exercise powers under the decisions of the national courts which are denied to them by the courts of their respective states. The decision in Bank v. Hart is therefore binding authority in this court in the case in hand. Madden v. Lancaster Co., 65 Fed., 188, 192; 12 C. C. A., 566, 570; 27 U. S. App., 528, 536; Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America, 27 C. C. A., 73, 77; 82 Fed., 124, 128; 49 U. S. App., 523, 534; *Id.*, 19 Sup. Ct., 341, 344."

(e) This defendant society is organized under the laws of New York State. Every person who has joined it as a policyholder has entered into his contract upon the basis of the laws of New York, as limited only by the Constitution and statutes of the United States. Every person becoming a policyholder since the decisions in the *Uhlman* case (109 N. Y., 421) and in the *Greeff* case (160 N. Y., 19) has had a right to rely upon and is bound by those decisions as part of the law of the State and, therefore, part of his contract. Every such person has presumably entered into his contract in the faith that it was the right and the duty of the society's officers " to retain out of its surplus an amount sufficient to insure the security of its policyholders, in the future as well as at present, and to cover any contingencies that might arise or be fairly anticipated " (160 N. Y., 34), and subject to the ruling that the relations of a policyholder to the Company are not those of *cestui que trust* and trustee, but simply that of creditor and debtor (109 N. Y., 421).

If this Court were now to depart from those rulings it would obviously be impairing the obligation of the contract which the society has made with every such person—it would, in other words, be doing the very thing which under the Constitution it is one of the highest privileges and duties of the Supreme Court to prevent others from doing.

The rulings of the *Uhlman* case and the *Greeff* case have been acquiesced in by the legislature of New York State. This acquiescence, considering the importance of the decisions, virtually amounts to a ratification of them by the legislature, and, therefore, gives the decisions as high a sanction as if they were express statutes.

The rulings in the *Greeff* case laid down by the highest court of the State, acquiesced in by the legislature, have become necessarily part of the constitution of the Equitable Life Assurance Society. What was the law yesterday is the law to-day, unless the legislature has changed it in the meantime—otherwise the very concept of "law" must be abandoned. The law governing this defendant society cannot be one thing when it comes before one court of last resort, and another thing when on another day it comes before another court of last resort.

It is well-known that the principal reason for conferring jurisdiction upon the United States Courts in cases of diverse citizenship is to guard against unjust discrimination. Therefore, it follows that the Federal Courts perform their whole duty when, in such cases, they enforce the local law as it would be enforced in a suit between citizens of the same state; and that, if they undertake to do more, they exceed the proper limits of their authority. This principle has been given statutory recognition in the Judiciary Act (U. S. R. S., Section 721). It accords with the fundamental Anglo-Saxon notion of the territorial force and extent of law.

The thought of the anomaly and the injustice which would result if the Supreme Court should depart from the rulings of the New York Court of Appeals on this question is appalling. A citizen of New Jersey might insist upon the distribution to him of a certain proportion of the society's "surplus," although all the policy-holders residing in New York might desire to have it reserved for the safety of the society. Yet the latter would point in vain to their contracts made on the faith of *Greeff vs. Equitable*. At the same time, if one of the New York policy-holders should desire to obtain present distribution of his share on the same terms as granted to the New Jersey policy-holders, he would be defeated.

II.

So far as the bill in this suit is based upon any alleged failure to comply with its charter or contract obligations as to the distribution of its entire net surplus, the bill is clearly demurrable under the rulings of the Court of Appeals of New York in Greeff vs. Equitable Life Assurance Society, 160 N. Y., 19.

Even if that decision is not conclusive in this Court, its reasoning is so clear and convincing that we have no doubt it will be followed and accepted by this Court as a sound construction of the Charter and the policy of the complainant.

In that case it was held that under the charter of this Society, it was not required "to distribute its *entire surplus* among its policyholders, but it is only required to credit to each policy an equitable share of the surplus, after deducting an amount sufficient to cover all outstanding risks and obligations, having due regard, in the exercise of a proper discretion, to the safety of all its policyholders and the security of its business; an accumulated fund is not required as matter of law to be distributed among the policyholders merely because the fund has been denominated by the officers of the company as a surplus, instead of a reserve fund" (160 N. Y., 20).

It was further held that "the question of how much of the surplus shall be distributed to the policyholders and how much shall be accumulated for the security of the company and its members is to be decided by the officers and managers, in the exercise of their discretion, having in view the present and future contingencies of the business; and in the absence of wrongdoing or mistake by them, their determination must be treated as proper, and their apportionment of the surplus is *prima facie* to be regarded as equitable" (*Ibid*).

What is the meaning of the phrase "wrong-doing" as here used, we shall discuss later, in connection with a discussion of the *Uhlman* case. We shall show that it means "wrong-doing" in the matter of the distribution or apportionment itself;—not mismanagement of the general affairs of the Society, giving rise to a cause of action for waste or accounting on behalf of the Society itself.

At this stage of the brief, we are merely pointing out that allegations of a violation of the charter duties of the Society's officers by reason of failure to distribute and apportion the "*entire surplus*" of the Society are wholly insufficient to set forth a cause of action.

It is to be observed that in the *Greeff* case as in the suit at bar, it was provided by the policy that it "shall be entitled to participate in the distribution of the Company's surplus, according to such principles and methods as may from time to time be adopted by the Company, and the policyholder has expressly ratified and accepted the principles and methods so adopted for the distribution of surplus", and it was held that this provision of the policy was binding upon the insured and was a bar to the suit. The Court say in the *Greeff* case at page 33:

> "The learned Appellate Division, while it admitted that the defendant had a large discretion in determining the amount of its surplus, and that it might increase its reserve fund for the security of its policyholders and to cover any contingent liabilities that might arise, taking such steps and adopting such principles and methods as were demanded by wise and prudent management to insure the prompt payment of losses and to successfully carry on and extend its business, still held that as the fund remaining in the defendant's hands had been denominated by it as surplus, instead of a reserve fund, all the usual powers and authority of its directors and managers to determine how and when it should be distributed, and all their discretion as to the manner of its disposition were spent, and, hence, they were required, as matter of law, to distribute the entire amount among its policyholders. We are not disposed to agree with that conclusion. We think this case should not be decided upon any such narrow or technical ground. It should be determined upon a fair interpretation of the intent and purpose of the provisions of the policy, and not by giving to a single word an undue, unusual or exaggerated effect. In a sense, all the funds in the possession of a mutual insurance company, over and above its immediate and present liabilities, may be regarded as surplus, yet it is not for that reason understood as belonging to, or to be immediately distributed among the policyholders, either by them or by the company.

If the same exaggerated meaning were to be given to the word 'liabilities' when applied to demands against the company, as was given to the word 'surplus,' it would include the full face amount of all its outstanding risks or policies, and no surplus would ever exist. The word 'surplus' like the word 'liabilities' has acquired a special meaning in this branch of the insurance business. *Under the provisions of this policy it is plain that the surplus and the distributable surplus are regarded as two distinct and separate funds.* The liabilities of a life insurance company are calculated upon rules based upon experience, which are dependent upon various contingencies. As applied in that class of insurance, the liabilities of a company do not represent the full amount of outstanding policies. So the word 'surplus' is used to designate the amount of funds in the hands of the company after deducting its liabilities as ascertained by certain rules adopted by the Insurance Department for determining the value of each risk. *Obviously the word 'surplus' was not used in the defendant's charter or policy to designate the amount of money in the company's hands, which was to be distributed among its policyholders,* but to represent the amount which should remain after certain calculated liabilities were deducted. When that amount was ascertained, it became the duty of the officers of the defendant to determine the portion of such surplus which should be distributed and the portion which should be retained for the benefit and security of the company and its members. *We find nothing in the policy which requires the defendant to distribute its entire surplus among its policyholders.* It is only required to credit to each policy an equitable share of the surplus, after deducting an amount sufficient to cover all outstanding risks and obligations. Under that provision the defendant had the right to retain out of its surplus an amount sufficient to insure the security of its policyholders in the future as well as at present, and to cover any contingencies that might arise or be fairly anticipated. Obviously, *it could not have been the intent of this provision to require the defendant to distribute its entire surplus,* so that any depreciation in its investments or increase of its liabilities by some unusual condition, or any change of the rate of interest in calculating its reserve would, of necessity, render it insolvent."

"The policyholder is to be credited only with an equitable share of such surplus, which must we think, be regarded such a share as might with due regard to the safety of all its policyholders, the security of its business, and in the exercise of a proper discretion, be thus credited. The adoption of principles or methods for the distribution of its surplus by which it was all distributed each year would not only place in jeopardy the security of every existing policy, but its tendency would be to prevent any increase of its business by obtaining new policies, and thus diminish its future receipts. It was essential to the prosperity of the defendant, and, consequently, to the security of its policyholders, that its business in the future should be increased, or at least maintained, as upon its maintenance its continued solvency and ability to pay future losses principally depended. No prudent person would be inclined to take a policy in a company which had so improvidently conducted its affairs that it only retained a fund barely sufficient to pay its present liabilities, and, therefore, was in a condition were any change by the reduction of interest upon, or depreciation in, the value of its securities, or any increase of mortality, would render it insolvent and subject to be placed in the hands of a receiver. The evident purpose of the provisions of the defendant's charter and policy relating to this subject was to vest in the directors of the corporation a discretion to determine the proportion of its surplus which should be divided each year."

And again the Court say on page 36:

"It is said that the charter provides for a distribution of the entire surplus when ascertained. We find no such provision in it. What it does provide is that when ascertained each policyholder shall be credited with an equitable share of the surplus, to be determined and applied in the manner stated and that the earnings and receipts over and above the dividends, losses and expenses shall be accumulated. Hence, if we assume that the charter and not the contract is to control (which we by no means hold), then the question at once arises who is to determine what an equitable distribution of the surplus is. Or, in other words,

the question is who is to determine how much of the surplus shall be distributed to the policyholders, and how much shall be accumulated and retained for the security of the society and its members. Manifestly that question is to be decided by the officers and managers of the defendant, who are to exercise their discretion in determining it, having in view the present and future contingencies of the business. In the absence of any allegation of wrongdoing or mistake by them, their determination of the question must be treated as proper and their apportionment of the surplus is *prima facie* to be regarded as equitable (Uhlman vs. N. Y. Life Ins. Co., 109 N. Y., 421)."

And again the Court say, at page 37 :

"Moreover, when the plaintiff obtained his policy, he knew, or, at least, could have easily ascertained, what principles and methods the defendant adopted in the distribution of its surplus, and that they were the same as were employed by all the successful mutual insurance companies doing business in this state. Presumptively, the plaintiff knew that the defendant had an undistributed surplus amounting to more than eight million dollars at the time his policy was issued, and that it was an added security thereto. That fact may very well have been an inducement to him to take a policy in the defendant's company. Thus, it is quite evident, not only that the plaintiff knew that the society accumulated a portion of its surplus each year, but that, independently of the provisions of the policy, he understood and consented to the principles and methods adopted and carried out by the defendant in its distribution."

The Court also call attention to the circumstance that there is no allegation "that the plaintiff has been inequitably treated *as between himself and the defendant's other policyholders.*"

The decision in the *Greaff* case is so manifestly just that we do not feel that any argument is necessary on our part to enforce the reasoning of Judge MARTIN in delivering the opinion of the Court, which was unanimously concurred in by all the Judges.

III.

So far as the bill is based upon the theory of a trust relationship between the policyholders and the Society, it is at variance with the settled law of New York as laid down by a long and unbroken line of decisions, culminating in the Uhlman decision.

The relation between the parties arises solely from the contract by the terms of which their rights must be governed. The Insurance Company is not a Trustee for the insured, even in case of a Tontine policy, much less in the case of an ordinary life policy, such as that held by complainant. If the terms of the contract are violated by the petitioner the remedy of the policyholder is by an action at law to recover damages for breach of contract.

The following authorities establish these propositions of law:

Uhlman vs. N. Y. Life Ins. Co., 109 N. Y., 421.
Everson vs. Equitable Life, 68 Fed. Rep., 258. affd., U. S. Cir. Ct. App., 71 Fed. Rep., 570.
Hunton vs. Equitable Life, 45 Fed. Rep., 661.
St. John vs. American Mutual Life Ins. Co. 13 N. Y., 31.
Cohen vs. Mutual Life Ins. Co., 50 N. Y., 610.
People vs. Security Life Ins. Co., 78 N. Y., 114.
Taylor vs. Charter Oak Life Ins. Co,, 9 Daly, 489; affd., 8 Abb. N. C., 331.
Bewley vs. Equitable Life, 61 How. Pr., 344.
Buford vs. Equitable Life, 98 N. Y., Supp., 152.
Pierce vs. Equitable Life, 145 Mass., 56.
Greeff vs. Equitable Life, 160 N. Y., 19.

It is said in the *Uhlman case*, per PECKHAM, J. (now Mr. Justice PECKHAM of this Court), at pages 428 and 429:

> "We are convinced, after a careful examination of the character of the relations existing between these parties, that it cannot be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts as to him and in relation to any such fund in a fiduciary capacity. It has been held that the holder of a policy of insurance, even in a mutual company, was in no sense a partner of the corporation which issued the policy, and that

the relation between the policyholder and the company was one of contract, measured by the terms of the policy" (see Cohen vs. N. Y. Mut. Life Ins. Co., 50 N. Y., 610; People vs. Security Life Ins. Co., 78, *id.*, 114).

IV.

The United States Circuit Court of Appeals misapprehended the force and effect of the obiter dicta in the case of Uhlman vs. New York Life Insurance Company (109 N. Y., 421).

The Court of Appeals, as will appear from its decision *per curiam*, in reversing the lower court relies entirely upon the *obiter dicta* in the *Uhlman* case. The Court quotes the language of Judge PECKHAM to the effect that the plaintiff in that case had made "no proof of misappropriation or wrongdoing," and also to the effect that

> "the plaintiff and all others similarly situated, have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial and make proof of such allegations, and if proved, the Court will declare the proper principles upon which the apportionment is to be made, so as to become an equitable apportionment,"

and the Circuit Court of Appeals then proceeds to rule that,

> "in the case at bar the precise situation is presented which was foreshadowed in the opinions referred to above, and thereby this case is differentiated from the preceding cases. Here the reports referred to and made a part of this bill are replete with specific circumstantial allegations of the precise facts constituting the fraud, waste and mismanagement complained of in connection with a detailed

showing, either of direct loss of funds or of illegal and unauthorized diversion and misappropriation of a considerable share of the profits belonging to defendant and of further waste and mismanagement by the payment of salaries originally excessive and unwarrantably increased, and of improper investments of and failures to invest the funds of defendant, particularly set forth in detail, all resulting in perpetration of wrongs on the policyholders, through violation of defendant's obligations to them,"

and the Circuit Court of Appeals then holds that complainant

"has a right to appeal to a court of equity for relief"

upon the facts alleged in the bill.

The question which the New York Court of Appeals in the *Uhlman* case was considering, and the only question, was whether a tontine policyholder had a right to invoke the aid of a Court for the purpose of reviewing the correctness of an apportionment which had been made under the terms of the contract between the policyholder and the company. The plaintiff had a tontine policy, under the terms of which the company had agreed to "equitably apportion" the surplus or profits to be derived from a particular class of policies. The question before the Court was whether the holder of such a policy, after the expiration of the period, and after the right to an apportionment had accrued, was entitled to have the *correctness of the company's apportionment* inquired into judicially. The Court held that there was no absolute right to have the Court make such inquiry; that the apportionment made by the company was to be taken as *prima facie* correct, and that in order to invoke the assistance of the Court and to obtain a judicial inquiry into the correctness of the apportionment made by the company, it was necessary for the plaintiff to make some *prima facie* case of error or of wrongdoing *in the matter of the apportionment.*

The bill in the case at bar *does not seek to review the action of the Society's officers in making an apportionment* of the Society's surplus as between the various classes of policyholders or as between the tontine or deferred dividend policyholders on the one hand and the non-tontine or non-deferred dividend policyholders on the other hand—as was sought to be done by the bill in the *Uhlman* case.

On the contrary, the bill in this suit seeks to review the Society's dealings with the policyholders as a body and to show—not that the Society has *wrongfully apportioned* its surplus, but that it has *failed to apportion* a considerable part of its surplus, wrongfully withholding the same from the policyholders. This clearly gives rise to a cause of action at law for breach of contract, if it gives rise to any cause of action whatever.

The Court in the Uhlman case did not rule, nor was it a necessary or proper inference from the Court's ruling, that in any event the plaintiff would be entitled to an accounting *in equity*. The Court had already explicitly ruled in that case, as it had done in previous cases and has since done in the case of *Greeff vs. Equitable*, that the rights of a policyholder in a mutual company, were rights solely *based on contract*, and that there was no inherent right to go into a court of equity, because of any fiduciary relation existing between the policyholder and the company, or because of any specific interest in the funds of the company as such.

The decision in the *Uhlman* case cannot properly be construed as holding that the plaintiff's remedy is *in equity*, even though it is to be construed as holding that there is *some remedy* for the complainant where a *prima facie* case is made of wrongdoing on the part of the defendant. That remedy would be in its nature a suit for breach of contract, and would be an action at law for failure to properly apportion the surplus as required by the contract.

It is further to be observed, however, that the Court of Appeals in the *Uhlman* case did not decide that *charges of wrongdoing or fraud* on the part of the officers of the Society, *affecting the Society itself*, or *all of the policyholders as a body*, would make a case for the re-examination by the Court of the *method and principle of apportionment of dividends as between the various policyholders.*

What the Court of Appeals was considering in the *Uhlman* case, was not any charges of fraud or wrongdoing by the officers or managers of the Company, which might give rise to a cause of action for waste, or a cause of action in equity for an accounting to the Company as a Company, but what the Court of Appeals was considering was the right of a policyholder to have the amount which had actually been apportioned to him as a dividend inquired into and re-examined, and the question of the correctness of the principle on which it had been apportioned inquired into.

So far as the opinion of the Circuit Court of Appeals intimates that fraud or wrongdoing on the part of the officers of the Society gives a remedy in equity, we submit that that Court has fallen into error, being misled by the supposed analogy of the *Uhlman* decision.

In *Watts vs. Equitable Life Assurance Society of the United States*, decided by the Supreme Court of the State of New York at Special Term in Orange County, in July, 1907, 55 Miscellaneous Reports New York, page 454, the law of New York is again laid down with regard to this Company, to the effect that

> "The relation of a life insurance company to its policyholders is not that of a fiduciary; and, although the holder of a policy which contains an agreement by the company to apportion equitably certain surplus profits to him and the holders of the other policies of the same class has a cause of action against the company for the breach of such agreement, it is a legal and not an equitable cause of action."

The Court says, per TOMPKINS, J., at page 456:

> "The law seems to be well settled that no trust relations exist between a life insurance company and a policyholder. The company agrees by its policy to pay a sum of money to the assured in consideration of the payment by him of fixed premiums. For a breach of the contract by the company, the assured may recover in an action at law; an action in equity, for an accounting, will not lie.
>
> "The application made by the policyholder to the company and the policy of insurance issued by the company constitute an ordinary contract between the parties, governed by the general rules regulating contracts; and it has always been held that, to entitle a party to an accounting in equity, there must exist some trust or fiduciary relation (Citing cases).
>
> "Plaintiff relies upon the case of *Uhlman v. New York Life Ins. Co.*, 109 N. Y., 421, but I do not think that the decision in that case bears the construction sought to be placed upon it by the plaintiff's counsel. In the first place, the court held squarely in that case that it cannot be said that a life insur-

ance company is in any sense a trustee of any particular fund for the plaintiff, or that it acts as to him, and in relation to any such fund, in a fiduciary capacity —and that the holder of a policy of insurance, even in a mutual company, is in no sense a partner of the corporation which issued the policy, and that the relation between the policyholder and the company was one of contract, measured by the terms of the policy, and that, upon the payment of the premiums by the various policyholders embraced in the tontine class, the money immediately becomes the property of the company, and no title thereto remains in any of the policyholders; and that the situation of the parties is that of debtor and creditor, simply, the amount of such debt being determinable by this equitable apportionment, which, taking the language of the policy into consideration, necessarily means that the apportionment is to be made by the corporation through its officers.

"The court, however, in the Uhlman case, after holding that there was no trust relation, and that an action for an accounting in that particular case would not lie, by way of dictum, said, in substance, that the apportionment made by the company, while *prima facie* to be regarded as the apportionment called for by the contract, was not absolute and at all events conclusive upon the policyholder; and also said that 'the question is still left, has or has it not complied with its agreement to make an equitable apportionment? And the plaintiff, and all others similarly situated, have the right, upon the proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial, and make proof of such allegations'.

"Undoubtedly the policyholder has a right of action for a breach of the contract, if the complaint alleges facts showing a breach thereof; *but the court does not hold in the Uhlman case that that remedy is by an action in equity*, while all of the cases, both before and since the Uhlman case, have held that a *suit in equity cannot be maintained* unless some trust or fiduciary relation exists between the parties. Root v. Railway Co., 105 U. S. 189; Salter v. Ham, 31 N. Y. 321; McCullough v. Pence, 85 Hun, 271; Hart v. Garrett Co., 87

App. Div. 536: Moore v. Coyns, 113 *id.* 52; Insurance Co., v. Bailey, 13 Wall. 616; Buzzard v. Housten, 119 U. S. 347; London Guarantee & Accident Co. v. Doyle, 130 Fed. Rep. 719."

V.

The bill cannot be sustained as a bill for fraud because, so far as any fraud affecting complainant's rights is concerned, he has an adequate remedy at law.

The opinion of the United States Circuit Court of Appeals, if we understand it correctly, bases the jurisdiction of equity solely on the ground of fraud. The Court does not question the former decisions above cited in *Everson vs. The Equitable Life Assurance Society; Uhlman vs. New York Life Insurance Company; Bewley vs. The Equitable Life Assurance Society*, and other cases, holding that there is no relation of trust between the complainant and the petitioner.

The question is, therefore, presented, whether the bill can be sustained in equity as a bill for fraud.

(a) It is no longer true, at least in the Federal Courts, that equity will take jurisdiction of every case of fraud. On the contrary, where the main object of the bill is to obtain relief that could be given by a court of law, equity will not take jurisdiction.

Ins. Co. vs. Bailey, 13 Wall., 616, 623.
Buzard vs. Houston, 119 U. S., 347, 352.
London Guarantee & Accident Co., Ld., vs. Doyle, 130 Fed., 719.
U. S. vs. Bitter Root Co., 200 U. S., 451.

In Ins. Co. vs. Bailey, *supra*, the Court said (p. 623):

"Courts of equity unquestionably have jurisdiction of fraud, misrepresentation and fraudulent suppression of material facts in matters of contract, but where the cause of

action is a purely legal demand * * * a suit in equity will not be sustained in a Federal court, as it is clear that the case under such circumstances is controlled by the sixteenth section of the Judiciary Act."

Buzard vs. Houston, supra, was a bill in equity for fraud brought, among other things, to obtain a decree for the payment of money. The Court dismissed the bill for want of jurisdiction and without prejudice to an action at law. The Court said (pp. 351, 352):

"In the Judiciary Act of 1789, by which the First Congress established the judicial courts of the United States and defined their jurisdiction, it is enacted that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law * * *.' Five days later, on September 29, 1789, the same Congress proposed to the legislatures of the several States the article afterwards ratified as the Seventh Amendment of the Constitution, which declares that 'in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The effect of the provision of the Judiciary Act, as often stated by this Court, is that 'whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy without the aid of a court of equity the plaintiff must proceed at law. * * * According a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief in kind or in degree on the equity side than on the common law side, as for instance by compelling a specific performance or the removal of a cloud on the title to real estate, or preventing an injury for which damages are not recoverable at law. * * *

"*In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages when the like amount can be recovered at law*," &c.

That the bill in the present suit is essentially a bill for relief of a legal character is apparent. Complainant's rights arise solely under a contract or policy of insurance. The bill is not brought for a rescission or reformation of the contract or for its specific performance. On the contrary it is brought to procure the payment or credit to complainant of money, viz., a portion of defendant's "surplus" which is alleged to be due under the contract and to have been fraudulently withheld and misappropriated, and incidentally for a discovery and accounting to ascertain the amount.

See First, Second, Fourth, Fifth and Sixth prayers for relief, at folios 96-99.

True, the bill also incorporates prayers for relief of an equitable character, viz., that a trust be declared to exist in favor of policyholders (Third prayer, fol. 97); that a receiver be appointed to take charge of the funds impressed with such trust (Eighth prayer, fol. 101), with a prayer for an injunction incidental to the receivership (Seventh prayer, fols. 99, 100). But none of these prayers can avail to support the jurisdiction of equity, because they all depend upon the theory of the existence of a trust relation, a theory which, while strenuously urged by the complainant, finds no support in the authorities.

It is confidently submitted, therefore, that the only relief to which complainant is entitled (assuming the allegations of his bill to be true), is relief of a legal character, and the case falls squarely within the rule laid down in the cases above cited.

(b) Nor does the fact that the bill also seeks discovery and an accounting, make a case for jurisdiction in equity.

Discovery and accounting are no longer sufficient ground for equitable jurisdiction in aid of relief of a legal character (in this case the payment of dividends alleged to have been wrongfully withheld).

U. S. Rev. Stats., Secs. 724.
Stafford vs. Ensign Mfg. Co., 120 Fed., 480.
London Guarantee & Accident Co., Ltd. vs. Doyle, 130 Fed., 719.
U. S. vs. Bitter Root Co., 200 U. S., 151.

Section 724 of the Revised Statutes provides that

> " In the trial of actions at law the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery," &c.

In the Safford case, *supra* (Cir. Ct. of Appeals, Fourth Cir., cited with approval 200 U. S., pp. 472, 478), a bill which sought an accounting and discovery under contract for royalties on a patent was dismissed. The Court said, among other things:

> " It has been held that in ordinary cases a pure bill of discovery can no longer be maintained in equity courts of the United States, because under Section 724, Rev. St., it is no longer generally needed (citing many cases). From these cases I deduce the doctrine that in a case in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand, the jurisdiction cannot be sustained. To sustain it would * * * permit by indirection the entertaining of a bil for discovery although the trend of authority is that a pure bill for discovery cannot be maintained in the Federal courts because it is no longer necessary."

London Guarantee & Accident Co., Ltd., vs. Doyle, *supra*, is a case closely in point. That was a bill for a discovery and accounting as to moneys due under a contract fraudulently broken by defendant. The Court sustained a demurrer and dismissed the bill, saying (at p. 720):

> " There is no relation of trust, properly so called, between the parties, and the only fraud charged is the defendant's declaration that ' the actual amount of said pay rolls was no greater than the estimated amount.' If this is not the truth the wrong can be fully remedied by compeling the production of the necessary books and papers in a suit

at law. It is not necessary that the precise amount (if any) that is due by the defendant should be known to the complainant before the suit is begun. If the company claims enough to be on the safe side, the exact sum can be found out afterwards without doing harm to any one. The case is not distinguishable, I think, from Safford v. Ensign Mfg. Co., 120 Fed., 480."

U. S. vs. Bitter Root Co., 200 U. S., 451, *supra*, was a bill for a discovery and accounting as to timber alleged to have been taken from complainant's land through fraudulent conspiracy, the details of which were set forth in the bill. The Court sustained a demurrer on the ground that equity had no jurisdiction over the cause of action set up in the bill. The Court said (per PECKHAM, J., p. 471):

"Although there is a liberal use in the bill in this case of averments in regard to fraud, conspiracy and violation of trust, of which the pleader avers the defendants have been guilty in various ways, yet, upon a careful examination of the pleading itself and the actual facts therein stated, we concur in the view of the courts below that the action is really nothing but an action of trespass or trover to recover damages sustained by the complainant * * * and for the wrongs thus done, we think it clear that the complainant has a plain, adequate and complete remedy at law, and consequently the court has no jurisdiction of this bill in equity. It is not necessary to cite many authorities for the proposition that where the main cause of action is of a legal nature equity has no jurisdiction; provided the complainant has a full and adequate remedy at law for the wrongs complained of (citing cases). A mere charge of fraud does not give equity jurisdiction. * * * The principal ground upon which it is claimed that the remedy at law is inadequate is really nothing more than a difficulty in proving the case against the defendants. The bill shows that whatever was done * * * was done by the defendants as tort feasors, and the various devices alleged to have been resorted to * * * by way of organizing different corporations in order to, as alleged, cover up his tracks and to render it more difficult for the

complainant to make proof of his action, does not in the least tend to give a court of equity jurisdiction on that account. * * * The complainant is entitled in an action at law to an inspection of the books and records of these various corporations, and it has the same power to obtain the facts therefrom in that action as it would have in this suit in equity."

VI.

So far as the bill is based upon mismanagement and waste of corporate assets by the directors and officers, the only cause of action set forth in the bill is one which should be brought in the name of and for the benefit of the Society as a corporation and not in the name of or for the benefit of policyholders who are merely contract creditors and who have not obtained any lien on the assets by way of judgment or otherwise and who have no claim as cestuis que trustent, as is perfectly well settled by all the cases.

It is not seriously claimed by counsel for the complainant that any case of insolvency is made out by the bill. In fact the allegations of the bill clearly set forth that there is a very considerable surplus over and above all liabilities, and that the defendant corporation is in every sense of the word entirely solvent. If, therefore, the policyholders are to be regarded as merely contract creditors, as held in the *Uhlman* case and the *Greeff* case, and all the other cases referred to under Point II., it follows that no suit can be sustained by such creditors to reach the assets of the corporation.

In *Graham vs. Railroad Company*, 102 U. S., 148, it is said by Mr. Justice BRADLEY, at page 160:

> "It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme domin-

ion over his own property, a corporation is a mere trustee holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

"We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

"When a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

If a creditor cannot interfere with the management of the assets of the corporation so long as it is solvent, it follows that a policyholder (who, as is held by the authorities, is *merely a a creditor and has only the rights of a creditor*), cannot assert the right of a stockholder to enforce in the name of the corporation the rights of action of the corporation for wrongful diversion of assets from the corporation by its officers or directors.

VII.

Furthermore, it is manifestly impossible to decree an accounting in this suit based upon waste of the Society's assets.

Suppose it be ascertained that $1,000,000 has been wrongfully taken from the assets of the Society by its former officers and directors, a decree cannot be made in this suit that the Society account to its policyholders for $1,000,000 which it does not possess. The directors and officers, who are claimed to have been responsible for such depletion of the Society's assets are not made parties defendant and cannot be compelled in this suit to refund or make good the $1,000,000 taken from the Society's surplus. The frauds, therefore, which are alleged in the bill, and which were held by the Circuit Court of Appeals to be sufficient to sustain the suit as a suit for an accounting are, we submit, not sufficient to sustain the bill, since, *even if the allegations are established by proof*, the Society *cannot apportion*, nor can any decree in this suit require that it shall apportion among the policyholders *the amounts of money so wasted or misapplied*, since the present officers and directors of the Society cannot apportion among its policyholders assets which it does not in fact possess, even though there be a theoretical right on the part of the present directors and officers of the Society to recover the assets wasted and misapplied, by a suit against the former officers and directors.

VIII.

It seems also sufficiently obvious that if this bill is to be sustained either as a bill to recover assets wasted by the officers of the Society, or as a bill for a receiver and to wind up the Society, there is a clear defect of parties defendant.

In any suit brought for a recovery of the assets alleged to have been wasted or wrongfully diverted from the Society, the officers

and directors are necessary parties; at least, those of them who are alleged to have profited by the wrongful use of the funds of the Society.

In any suit brought for the appointment of a Receiver and the winding up of the corporation the stockholders are certainly necessary parties, and it is their corporation which is sought to be wound up, and they are vitally interested in the question of whether the corporation shall be allowed to proceed in its business.

So far as this suit is brought to obtain a decree that the surplus of the Society over and above the $100,000 of capital stock belongs to the policy holders and not to the stockholders, there is a clear defect of parties defendant, in that the stockholders are vitally interested in this question. The corporation itself is not the proper party to protect the interest of the policyholders as against the interests of the stockholders. Nor would a decree in this suit against the rights of the stockholders be any protection to the Society or to the policyholders as against the stockholders themselves.

It is a general principle of courts of equity that all parties whose interests will be affected by the decree, should be before the Court, and any decree rendered in their absence affecting their property rights is utterly ineffective, and if such parties are not before the Court, the Court will dismiss the bill of its own motion, even if no demurrer is interposed.

See

Minnesota vs. Northern Securities, 184 U. S., 199, pp. 235–7.

Christian vs. Atlantic & N. C. R. R. Co., 133 U. S., 233, page 241.

Gregory vs. Stetson, 133 U. S., 579, at p. 586.

Indeed, the present bill goes so far as to claim that *all* of the *assets* of the Society belong to the policyholders to the exclusion of the stockholders, and seeks to impress a trust in favor of the policyholders upon all of the assets. Surely the stockholders are entitled to be heard upon any such claim, and no effective decree can be made, in their absence, upon this branch of the case.

In the case of the *People against The Equitable Life Assurance Society*, decided by Mr. Justice BISCHOFF (see Opinion reported in 51 New York Miscellaneous Rep., 339), which was a suit brought against the officers and directors of the defendant Society to recover for the alleged acts of waste and misappropriation, which were disclosed by the investigation of the Frick

Committee and of the Superintendent of Insurance, which are set forth in the bill of complaint in this suit, the Attorney-General sought also to recover for failure to distribute to policyholders the share of the profits of the corporate enterprise called the "surplus," to which it was claimed they were entitled under the charter and by-laws. The Court held that as to this cause of action there was a defect of parties in the nonjoinder of the policyholders, or one or more of them, as the representatives of all. The objection as to nonjoinder of stockholders was not raised or passed upon but it would logically follow that if the question of the right to the surplus could not be passed upon in the absence of the policyholders, *a fortiori* it could not be passed upon in a suit brought by the policyholders in the absence of the stockholders. The Court says, at page 351:

> "From the nature of the case, the record would be incomplete for the purpose of the judgment sought, unless these persons, whose interests are to be concluded, be joined, and no reason is suggested for a departure in this case from the rule, which requires that parties who are to be actually affected by a decree and whose rights and interests are to be measured thereby should be before the Court."

After the decision of Mr. Justice BISCHOFF, the complaint was amended by striking out the cause of action as to the so-called "surplus," and after such amendment, the suit came before the Appellate Division, where the judgment of the Special Term was reversed on other grounds (see *People vs. Equitable Life Assurance Society*, 124 App. Div., 714).

IX.

The main relief sought by the bill of complaint appears to be an accounting covering all the transactions of the petitioner for a period of upwards of forty-five years, and for redress by reason of the alleged waste, misappropriation and misapplication of the funds and assets of the petitioner. These allegations of

waste and misappropriation are charged against officers and directors of the petitioner. None of these officers and directors are made parties defendant, and even if, upon such an accounting, it should be shown that they had wrongfully or fraudulently wasted or misappropriated the petitioner's assets, no decree could be entered requiring restitution thereof.

The petitioner has outstanding assurance contracts aggregating $1,495,542,892 and assets of $413,953,021, which includes a surplus over all of its liabilities of $40,794,269 (fol. 39). It has upwards of five hundred thousand policyholders resident in the various States of the United States, as well as in foreign countries, and if this suit can be maintained by one of such policyholders, every other one of them may maintain a similar suit against your petitioner, demanding a similar accounting in the jurisdictions in which such suits may be brought. The expense of an accounting covering upwards of forty-five years, during which period the Society has done business, and involving the vast amount of assets of which it is possessed, will be enormous, and will fall solely upon the body of policyholders, whether they be in sympathy with the suit or not.

As suggested above, if one suit may be maintained any number of them may be, with the result that a great part of the Society's assets will of necessity be expended in accountings in suits in equity, in which may be entered decrees which will be fruitless, in view of the fact that the officers and directors against whom charges of waste and mismanagement may be made are, under the decision of the United States Circuit Court of Appeals in this case, unnecessary parties defendant to such suits.

As was well said by PECKHAM, J., in *Uhlman vs. N. Y. Life Ins. Co.*, 109 N. Y., 435:

> "Of course it is not to be supposed that each individual policyholder would avail himself of this right, but the fact that each one might, would place the company in the power of unscrupulous parties to take advantage of it for the purpose of endeavoring to levy contribution from it which it might pay in order to secure freedom to itself from troublesome, expensive, unnecessary and wholly disingenuous investigations (and made in numerous suits) into the affairs of the company and its accounts running through many years. That this should be permitted without an allegation, even

on information and belief, that any fraud, mistake or impropriety in the accounts or in the manner of their statement, or in the results attained, had been made by the officers or agents of the company would seem to be intolerable."

The qualifying sentence added by the learned Judge does not, as we have seen, apply to this suit. The allegations of fraud and mismanagement contained in the bill of complaint in this suit relate, not to the method of stating the accounts or the result arrived at in apportioning dividends, but have reference to general waste and mismanagement of the corporate assets. The remarks of the learned Judge with regard to the inconveniences and hardships resulting from unfounded suits for accounting on behalf of policyholders, are pertinent to the situation in this suit.

Insurance corporations and their officers and directors should be subject to the supervision and control of the authorities of the State of the creation of such companies, and all actions for accounting should be brought by or under the supervision of such authorities.

The Attorney-General of the State of New York is clothed by the statutes of the State with full authority to bring suit against the officers and directors of the Society to recover assets wrongfully misappropriated. The presumption of law is that he has brought such suit as his duty required—a presumption, we may be permitted to add—which, if the facts were fully set forth in the bill up to the present time, would be shown to be justified by the event.

A reference by the Court to the decision already cited under the previous point, namely, *People against Equitable Life Assurance Society*, 51 New York Miscellaneous Rep., 339, will show the nature of the suit thus brought and the scope of relief prayed therein. See also, decision of the Appellate Division, 124 App. Div., 714.

In spite of the wave of righteous indignation which was aroused by the insurance investigation of 1905, it still remains as true to-day as it was at the time of the *Uhlman* decision, that it is the duty of the Courts, and particularly of courts of equity, to protect insurance companies from merely harrassing and annoying litigations which can be of no substantial benefit to the policyholders.

A court of equity has the right and is bound to consider the relative advantages and disadvantages of granting equitable relief.

> "It *gives or withholds (its) decree* according to its *discretion*, in view of the circumstances of the case."
> *Trustees of Columbia College vs. Thacher*, 87 N. Y., 317.

> "A court of equity will not do an inequitable thing. It is not bound by the rigid rules of the common law, but is founded to do justice, where the courts of law with their less plastic remedies, are unable to afford the exact relief which the facts require. Its fundamental principle, as its name implies, is equity. *It withholds the remedies if the result would be unjust*, but freely grants them to prevent injustice where the other Courts are helpless."
> *McClure vs. Leaycraft*, 183 N. Y., 36, 41.

See, also,

New York vs. Pine, 185 U. S., 93.
Penryhn Slate Co. vs. Granville El. L. & P. Co., 181 N. Y., 80.
Knoth vs. Manhattan Ry. Co., 187 N. Y., 243.

It is proper also in this connection to call the attention of this Court to the fact that since this suit was commenced the Legislature of the State of New York has adopted remedial legislation which renders practically unnecessary any judicial determination as to the rights of policyholders in the surplus of the Society.

See Chapter 326 of the Laws of 1906 amending the Insurance Law of the State.

See especially Section 23, amending Section 83 of the Insurance Law, with regard to distribution of surplus to policyholders and providing for apportionment of surplus among the policyholders.

See, also, Section 26, amending the Insurance Law by adding a new section, known as Section 87 and providing for a so-called "contingency reserve," which in effect provides that any domestic life insurance corporation may accumulate and maintain in addition to its net reserve, as required by law, a contingency reserve, which in the case of a corporation whose net reserve exceeds $75,000,000, shall not exceed five per centum thereof, unless for cause shown the Superintendent of Insurance shall permit the corporation to accumulate and maintain a contingency reserve in excess of such limit for a prescribed period.

X.

The allegations of the bill to the effect that of the fifty persons composing the Board of Directors, only ten were proprietors of five shares each of the capital stock of the Society (as required by the Charter) seem to us so manifestly immaterial as to call for no discussion.

Neither the Circuit Court nor the Circuit Court of Appeals deemed these allegations worthy of notice.

The same allegations were made in the supplemental complaint in the suit of *Lord vs. The Equitable Life Assurance Society*, reported 57 N. Y. Miscellaneous Reports, 417. That was a suit brought to enjoin the Society from adopting an amended charter giving the policyholders the right to vote for a majority of the Directors. The suit was brought by one of the stockholders, claiming that his property rights were interfered with and his contract rights impaired by taking away his right as a stockholder under the charter, to vote for all the directors.

The suit was begun in the spring of 1905 to enjoin the adoption or carrying into effect of a proposed amended charter, which had been unanimously adopted by the Board of Directors, giving the policyholders the right to vote for a majority of the Board. The Court at Special Term granted the injunction, on the ground that plaintiff's constitutional rights were impaired by the proposed amended charter. The Appellate Division overruled this ground and held that the Legislature had the power to authorize such an amended charter under the power to alter or repeal charters reserved by the Revised Statutes and the Constitution of the State, but affirmed the decision below on the ground that the Statutes as they then stood did not authorize the directors to make such an amendment of the Charter (109 App. Div., 252).

Thereafter, in 1906, the Legislature amended Section 52 of the Insurance Law so as to authorize the Board with the approval of a majority of the stockholders, to adopt such an amendment to the Charter. The Board having thereafter adopted an amended charter giving to the policyholders the right to vote for a majority of the directors, a supplemental complaint was served attacking the new charter, on the same constitutional grounds urged against the proposed amended charter of 1905. Incidentally plaintiff claimed in his supplemental complaint, that a majority of the directors who

voted for the amended charter were disqualified because not proprietors of five shares of stock as required by the Society's Charter.

The opinion of the Court at Special Term, by Mr. Justice CRANE of the New York Supreme Court, in sustaining defendant's demurrer to the complaint, after overruling the Constitutional points raised by plaintiff, following the previous ruling of the Appellate Division in the same suit, reported 109 App. Div., 252, proceeds as follows with regard to the qualifications of the Directors (57 N. Y. Miscellaneous Reports, p. 426) :

> "Under the plaintiff's second point of attack it is true that the charter of 1850" (1859) "provided that the directors should be proprietors of five shares of stock each ; but this the Legislature under its reserve power had the right to change and modify and, in my opinion, did so modify by section 20 of the Stock Corporation Law (Laws of 1892, chap. 688). The provision is: 'Policyholders of insurance corporations shall be eligible to election as directors.'
>
> "If eligible to election, why not eligible by appointment to fill vacancies? At the time, therefore, that the board of directors, consisting in part of policy holders not stockholders, took action under the Laws of 1906 on the proposed amended charter, it was, in my opinion, a legally constituted board, and its call for a meeting of the stockholders and its subsequent ratification of the action of the stockholders were legal and not void acts. Even if the policy holders were not duly qualified as directors, it is stated in the complaint that they were appointed to fill vacancies, assumed to act as directors and continued so to act at the time therein mentioned. If they were acting illegally, the plaintiff as a stockholder had his remedy against them or the board ; and I doubt very much whether he can now attack them collaterally by attacking their acts as he seeks to do here. As *de facto* directors they could act for the company while continuing in the position. 2 Cook Corp., 623 ; Langan v. Francklyn, 20 N. Y. Supp., 404; Matter of Santa Eulalia Silver Mining Co., 4 *Id.*, 174, aff'd 115 N. Y., 657; Trustees of Vernon Society v. Jesse Hills, 6 Cow., 23; People v. Hillis, 1 Laus., 202; Wallace v. Walsh, 125 N. Y., 26."

The decision of Mr. Justice CRANE was unanimously affirmed by the Appellate Division (126 App. Div., 937). The authorities cited by Mr. Justice CRANE in his opinion fully support his conclusion on this point.

XI.

We submit that the decree of the Circuit Court of Appeals should be reversed and the decree of the United States Circuit Court for the Southern District of New York sustaining the defendant Society's demurrer should be affirmed.

WILLIAM B. HORNBLOWER,
ALLAN MCCULLOH,
Of Counsel for Petitioner.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 74.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PETITIONER,

vs.

J. WILLCOX BROWN, &c.

REPLY BRIEF FOR PETITIONER.

WM. B. HORNBLOWER,
ALLAN MCCULLOH,
Of Counsel for Petitioner.

(20,692.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 74.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PETITIONER,

against

J. WILLCOX BROWN, ON BEHALF OF HIMSELF, ETC., RESPONDENT.

REPLY BRIEF FOR PETITIONER.

There are two or three points in the respondent's brief to which we desire to call the attention of the court.

I.

As to the case of *Fuller vs. Knapp,* 24 Fed. Rep., 100. That was a suit brought by the holder of a policy of the Metropolitan Life Insurance Company, issued on the "reserved dividend plan." This plan was similar to the so-called tontine plan of the Equitable Life and of the New York Life, by the terms of which the policy holder waives his right to annual dividends, but is entitled, if his policy is in force at the expiration of the tontine or reserved dividend period, to a share in the surplus accumulated from policies of the same class.

The policy in the suit at bar is not a tontine or reserved dividend policy, but is an ordinary life policy with a right to annual dividends, which are payable out of the general funds of the society and not out of any special tontine or reserved dividend surplus. In other words, complainant in this suit has no special interest in or lien upon or right to any particular fund accumulated for the benefit of any particular class of policies, but is only entitled to an equitable share out of the general surplus of the society on the same terms as all other policy holders, holding ordinary life policies of the so-called "participating" class, as distinguished from "non-participating" policy holders and as distinguished from reserved dividend or tontine policies.

The theory on which the bill was filed in the *Fuller* case was that the complainant was entitled to an accounting of the special fund held and accumulated for the benefit of the reserved dividend policies of the same class as the complainant's policy. As to this Judge Wallace says at page 104:

> "Upon the case-made, they are entitled to a portion of the fund, the amount of which necessarily involves an inquiry as to the number and amount of the policies of the class of 1874, the dividends which accrued upon them, the number that have been forfeited or have lapsed by retirement or death, the times when they lapsed or became forfeited, and of the interest due upon the investment of the dividends. In the management of this fund the company acts as the agent, in a limited sense, of the policy holders, and owes them the duty of keeping a correct account of the fund. It refuses to render that account, and seemingly takes the position that the policy holders have no right to an account."

It will be perceived that the peculiar character of the policies belonging to the reserved dividend class and the peculiar nature of the fund were the grounds for the court sustaining the bill in that case. The court, however, say:

> "Jurisdiction in this class of cases, depending as it does, not so much on the absence of the common-

law remedy, as upon its inadequacy, is exercised largely as a matter of *judicial discretion*, influenced by the *particular circumstances of each case* and the *conduct of the parties.*"

We submit that in the case at bar the judicial discretion should be exercised in favor of the defendant and against the complainant for the reasons which we have set forth in subdivision IX of our main brief (pages 56-59; see authorities on page 59).

It is to be borne in mind, however, that the *Uhlman case* (Uhlman *vs.* N. Y. Life Ins. Co., 109 N. Y., 421) was precisely such a suit as this *Fuller* suit, being based upon a "Tontine" policy, and the same arguments were used in support of the bill as were used in support of the bill in the *Fuller case,* but the Court of Appeals refused to entertain the bill. We have discussed this case at length in our main brief and shall not repeat the observations made thereon.

II.

As complainant's bill makes various statements with regard to the suit of *Lord vs. The Equitable Life Assurance Society,* and as respondent's brief has much to say on this subject, it is proper to call the attention of the court to the fact that the society has never admitted the validity of the stockholders' position as taken in the Lord suit. On the contrary, a demurrer to the complaint in that suit was promptly interposed. Without recapitulating the history of that suit, which we have already stated in our main brief, it is sufficient to say that a demurrer interposed by the society to the amended and supplemental complaint in that suit was sustained by the Supreme Court of New York at special term. The decision sustaining it was affirmed unanimously by the appellate division of the Supreme Court, and an appeal from that decision is now pending in the Court of Appeals of the State of New York. Any infer-

ence, therefore, that may be drawn from the allegations of the bill in this suit, or from the brief of the respondent that the society has acquiesced in the position taken by the stockholders in that suit as against the policy holders is erroneous; the exact contrary is the fact.

III.

The amended and supplemental bill of the complainant in this suit brings the history of the society down to the summer of 1905.

It is proper to call the attention of the court to the history of the society since that date, of which this court can take judicial notice, since it is embodied in the acts of the legislature in 1906 and in the report of a joint committee of the legislature, known as the Armstrong Investigating Committee, which investigated the affairs of insurance companies, including the affairs of this society in the fall of 1905, and which reported to the legislature in February, 1906. Together with its report a number of amendments to the general insurance law were adopted by the legislature. One of these amendments was designed to so amend section 52 of the general insurance law as to obviate the objections made by the appellate division of the Supreme Court to the amended charter of this society, as theretofore adopted by the board of directors, the appellate division holding in the Lord case (109 New York Appellate Division Reports, p. 252) that the legislature had the constitutional right to authorize an amendment of the charter giving the policy holders the right to vote for directors, but that section 52 of the insurance law, as it then stood in 1905, did not in fact authorize such a radical change in the charter.

By chapter 326 of the laws of 1906, section 13, section 52 of the insurance law, was amended so as to read as follows:

"SEC. 52. REORGANIZATION OF EXISTING CORPORATIONS AND AMENDMENT OF CERTIFICATES.—Any

domestic corporation existing or doing business at the time this chapter takes effect, may, by a vote of a majority of its directors or trustees, accept provisions of this chapter and amend its charter to conform with the same, upon obtaining the consent of the superintendent of insurance thereto in writing; and thereafter it shall be deemed to have been incorporated under this chapter, and every such corporation in reincorporating under this provision may for that purpose so adopt in whole or in part a new charter, in conformity herewith, and include therein any or all provisions of its existing charter, and any or all changes from its existing charter, to cover and and enjoy any or all the privileges and provisions of existing laws which might be so included and enjoyed if it were originally incorporated thereunder, and it shall, upon such adoption of and after obtaining the consent, as in this section before provided, to such charter, and filing the same and the record of adoption and consent in the office of the superintendent of insurance, perpetually enjoy the same as and be such corporation, and which is declared to be a continuation of such corporation which existed prior to such reincorporation; and the offices therein which shall be continued shall be filled by the respective incumbents for the periods for which they were elected, and all others shall be filled in the same manner by such amended charter provided. Every domestic insurance corporation may amend its charter or certificate of incorporation by inserting therein any statement or matter which might have been originally inserted therein; and may likewise amend its charter or certificate of incorporation, by inserting therein any powers which, at the time of such amendment, may have been conferred by law upon domestic insurance corporations engaged in a business of the same general character, or which might be included in the certificate of incorporation of a domestic insurance company organized under any general law of this state for a business of the same general character; and the same proceedings shall be taken upon the presentation of such amended charter or certificate to the superintendent of insurance, as are re-

quired by this chapter to be taken with respect to an original charter or certificate, and if approved by the superintendent of insurance, and his certificate of authority to do business thereunder is granted, the corporation shall thereafter be deemed to possess the same powers and be subject to the same liabilities as if such amended charter or certificate had been its original charter or certificate of incorporation, but without prejudice to any pending action or proceeding or any rights previously accrued. *Upon the reincorporation or upon the amendment of the charter of any life insurance corporation, having a capital stock,* in accordance with the provisions of this section, *it may by a vote of a majority of its directors confer upon its policyholders* or upon such policyholders as may have a prescribed amount of insurance upon their lives *the right to vote for all or any less number of the directors* in such manner not inconsistent with any provision of this chapter *as may be authorized by a vote of the stockholders representing at least a majority of the capital stock at a meeting of stockholders called for the purpose.* Section thirty-two of the stock corporation law shall not apply to such a corporation. *This section shall apply to insurance corporations organized under or subject to article six of the insurance law as well as to insurance corporations organized under a special act or any general law or article two of the insurance law.* In the case of any corporation organized under or subject to article six of the insurance law, which corporation has amended its charter and is now operating under article two of the insurance law, all contracts, policies and certificates issued prior to its reincorporation, shall be valued as one year term insurance at the ages attained excepting when such contracts, policies or certificates shall provide for a limited number of specified premiums or for specified surrender values in which case they shall be valued as provided in article two, section eighty-four of the insurance law. But no life insurance corporation shall hereafter be permited to avail itself of the provisions of this section until it shall hold for all its outstanding policies or certificates assets equal in value to the minimum reserve required by section eighty-four of the insurance law."

As appears from the report of the Armstrong Investigating Committee, this amendment of the law was intended to carry into effect the first decision of the appellate division in the Lord suit and to obviate the objections taken to the former amended charter of the defendant society under the then existing insurance law.

It appears from the subsequent proceedings in the case of *Lord vs. The Equitable Life Assurance Society* that the society, after the amendment of 1906, adopted a further amended charter by a unanimous vote of the directors and by the vote of a majority of the stockholders, conferring upon the policyholders the right to elect a majority of the directors of the society. The society has since been acting under this new amended charter, and all of the present directors of the society have been elected thereunder and are the direct representatives of the policyholders. It is this new amended charter, adopted under the laws of 1906, which is now being attacked in the Lord suit on behalf of certain of the stockholders. The society is defending that charter to the best of its ability and has, thus far, defended it successfully, a demurrer to the amended and supplemental complaint in that suit having been sustained by the Supreme Court of New York at special term (see opinion of Crane, J., 57 N. Y. Miscellaneous Reports, 417), and the judgment of the special term has been unanimously affirmed by the Appellate Division (126 App. Div. Rep., 937). An appeal by plaintiff from this judgment is now pending in the Court of Appeals of New York.

IV.

We submit that it is hardly fair to this court that the important facts with regard to the history of this society since the date of the supplemental bill should not be presented to this court for its consideration, especially where its discretion is appealed to. At any rate, we submit that so far as the acts of the Legislature are concerned, and the report of

the Armstrong committee and the decisions of the courts, the matters set forth are matters of *public record,* of which this court must take judicial notice, even though not set forth in the supplemental bill.

The situation of the society has been so absolutely and entirely changed since the report of the Armstrong investigating committee and the amendments adopted by the Legislature in 1906 that the facts set forth in the supplemental bill are no longer applicable to the present status of the society.

WM. B. HORNBLOWER,
ALLAN MCCULLOH,
Of Counsel for Petitioner.

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IN THE

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1908.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Petitioner,

against

J. WILLCOX BROWN, on behalf of himself, etc., Respondent.

No. 74.

BRIEF FOR COMPLAINANT-RESPONDENT.

Preliminary Statement.

Any facts in this case which are not referred to in the brief of the petitioner, and to which the respondent wishes to direct the attention of the Court, are mentioned in this brief in connection with the argument of the particular proposition involved.

The Charter or Articles of Association of the petitioner are to be found on page 35, Transcript of Record.

The Policy of Insurance issued to the respondent is to be found on page 42 of the Record.

The report of the Investigating Committee of the Board of Directors of the Equitable Life Assurance Society, known as the "Frick Report," is to be found at page 100 of the Record.

The preliminary report of the investigation into the management of the Equitable Life Assurance Society made to the Governor of the State by the Superintendent of Insurance is to be found at page 101 of the Record.

The circumstances attending the alleged sale of 502 shares of the stock of the Society by James H. Hyde to Thomas F. Ryan are to be found in Subdivision A of the Sixth paragraph of the Bill, and the Trust Agreement is contained at page 50 of the Record, marked Exhibit E.

The case at bar is unique. It is unlike, in all essential aspects, any of the legal controversies which have taken place between policy holders and life insurance companies.

Both the highest State Court of New York[1] and the Federal Court[2] sustain the bill in this case.

The language of the Court in the Uhlman case is as follows:

> "We do not, however, accede to the claim of the defendant herein to its full extent as

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[1] Uhlman vs. New York Life Ins. Co., 109 N. Y., 421, at page 432;
Greeff vs. Eq. Life Ass. Soc'y, 160 N. Y., at page 36;

[2] Everson vs. Equitable Life Assurance Society, 68 Fed. Rep., 258, affirmed 71, Fed. Rep., 570.

made in the brief submitted, which is, that the apportionment, as made by the defendant, is absolutely, and, at all events, conclusive upon the policyholders. We hold that, under the terms of this policy, the apportionment was to be equitably made, and, in the first instance, by the defendant's officers or agents. *But, inasmuch as the agreement is that the apportionment shall be an equitable one, the question of what is an equitable one, all the facts and circumstances being known, may be one over which the courts have supervision. Prima facie,* the apportionment, as made by the defendant, should be regarded as a compliance with the terms of the policy, or, in other words, should be regarded as an equitable apportionment. It should be thus regarded, because by the terms of the policy the duty of making it is cast upon the corporation, and it ought to be presumed that the defendant has performed its duty instead of presuming that it has failed to do so. *But the question is still left, has or has it not complied with its agreement to make an equitable apportionment?* **And the plaintiff and all others similarly situated, have the right upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial and make proof of such allegations, and, if proved, the Court will declare the proper principles upon which the apportionment is to be made, so as to become an equit-**

able apportionment. The various cases cited in the brief submitted, where the legislature has appointed parties to apportion stock in a bank created by its laws, etc., and where the courts have held that the apportionment by the board thus created was final, do not, we think, conclude us here. The principles are entirely different. *But as the plaintiff herein has made no proof of any misappropriation or wrong-doing, we are of the opinion that, upon the first question argued, he has failed to show any right to an accounting by the defendant."*

In the Greeff case[1] the Court of Appeals reiterated the above language, saying:

> "In the absence of any *allegation of wrong-doing or mistake* by them their determination of the question must be treated as proper and their apportionment of the surplus is *prima facie* to be regarded as equitable."

At page 259 in the Everson case,[2] the Federal Court referred to the Uhlman case, adopted its language, and proceeded as follows:

> "But, as was also said in that case, 'the question is still left, has or has it not complied with its agreement to make *an equitable* apportionment? And the plaintiff and all others similarly situated, have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous

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[1] 160 N. Y., page 36.

[2] 68 Fed. Rep., 258.

principles, to have a trial and make proof of such allegations, and, if proved, the Court will declare the proper principles upon which the apportionment is to be made, so as to become an equitable apportionment.'"

We beg also to call the special attention of this Court to an Act (now repealed) of the Legislature of New York, Chapter 690, of the Laws of 1892, which reads as follows:

> "56. *Proceedings for accounting, injunction or a receiver must be upon application of the attorney-general.*
>
> No order, judgment or decree providing for an accounting or enjoining, restraining or interfering with the prosecution of the business of any domestic insurance corporation or appointing a temporary or permanent receiver thereof shall be made or granted otherwise than upon the application of the attorney-general, on his own motion or after his approval of a request in writing therefor of the superintendent of insurance, except in an action by a judgment-creditor or in proceedings supplementary to execution."

The learned Judge who sustained the demurrer of the petitioner in this case, laid great emphasis upon the above statute as being a bar to respondent's bill.[1] He held that that statute was part of the contract of insurance and barred any remedy of the policyholders for an accounting, and while we think and will endeavor to show hereafter, that no State statute can deprive the Federal Court of its jurisdiction in an equity case, yet the above statute, *it is conceded, was repealed by Chapter* 326, *Laws of* 1906, and it can now be said with full confidence

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[1] See pages 72, 73 and 74 of the Record.

that *it is the policy of New York, and a wise policy withal,* after the extraordinary disclosures of fraud in connection with this Society, *to open wide the doors of the courts to the policyholders, to enable them to obtain an accounting in a proper case, and to prevent effectually by such inspection a recurrence of the disgraceful acts of insurance officers which this record discloses.*

The Circuit Court of Appeals in reversing the judgment of Judge Hazel, sustaining the demurrer to the bill, held that the Uhlman case was a precedent in favor of the bill, and that the repeal of the statute preventing actions for an accounting against insurance companies above referred to, removed any bar to a suit of this character. The Court said:

> "An examination of the authorities which are material to this discussion shows that upon whatever other grounds the courts may have reached conclusions adverse to the rights of policyholders, yet in none of said cases in the Federal courts or in the court of last resort of the State of New York, have there been definite, specific allegations of facts charging bad faith, wilful neglect, abuse of discretion, fraud or misappropriation by the defendant."[1]
>
> * * * * * * *
>
> "In the case at bar the precise situation is presented which was foreshadowed in the opinions referred to above, and thereby this case is differentiated from the preceding cases. Here the reports referred to and made a part of the bill are replete with specific circumstantial allegations of the precise facts constituting the fraud, waste and mismanagement complained of, in connection with a detailed showing either

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[1] Record page 103-4.

of direct loss of funds, or of illegal and unauthorized diversion and misappropriation of a considerable share of profits belonging to defendant, and of further waste and mismanagement by the payment of salaries originally excessive and unwarrantably increased, and of improper investments of and failures to invest the funds of defendant, particularly set forth in detail, all resulting in perpetration of wrongs on the policyholders through violation of defendant's obligations to them."[1]

The Petitioners filed a petition for a re-hearing *"for the reason that this Court has overlooked certain considerations which in the opinion of your Petitioner are controlling,"* and filed a memorandum in support thereof,[2] which was in due course denied.[3]

It will be seen that the very cases which Petitioner relies upon to defeat this action are those which the Circuit Court of Appeals held were decisive of the right of Respondent to maintain his Bill. For fifty years this Petitioner has successfully invoked every argument and technicality to defeat the policyholders in their efforts to look into the inner methods of the Society in respect to apportionment of the surplus and of the means used to preserve its property. Now that the legislature has removed the barrier heretofore set forth; now that a case is made which falls within the rules laid down in the Uhlman and Greeff cases, it is still insistent, and brazenly proclaims that the Circuit Court of Appeals has misunderstood their purport.

The above considerations, we respectfully submit, should terminate this controversy, and put the de-

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[1] Record page 105-6.
[2] Fol. 325 of the Record.
[3] Ibid, fol. 329.

fendant upon its answer to the bill. But we proceed to show, by both general authority and precedent, that the conclusion reached by the Circuit Court of Appeals in this case, is absolutely correct.

There are three main propositions which we shall discuss.

FIRST.—That the relation existing between the respondent and petitioner was fiduciary, and that a valid trust arises therefrom both as to the corpus and surplus in the hands of the Society, which a Court of Equity will protect and enforce. This proposition is divisible into two heads:

1. The trust relation arises *ab origine*. as to the body of the property and surplus of the Society, and the policy of insurance is in effect a deed of trust when read in connection with the Act incorporating the Society, and its charter and rules.

2. That if this proposition be not correct, the Petitioner is at least a trustee as to the surplus, and is to be held to strict accountability for its non-apportionment, waste or disappearance.

SECOND.—Even if there be no technical trust relation, under the circumstances disclosed in the bill, a Court of Equity, in an omnibus and class suit, will assume jurisdiction, *there being no adequate remedy at law*, the suit involving many and complicated accounts and the necessity of a multiplicity of suits, growing out of *the different classes of policy-holders* interested.[1]

THIRD.—Upon either of the above grounds the complainant shows that he is entitled to full equitable relief.

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[1] Bitterman vs. Louisville & Nash. R. R., 207 U. S., 205, at page 225.
U. S. vs. Bitter Root Development Company, 200 U. S., 451, at page 479.

FIRST.

A trust relation arose, ab origine, between the respondent and petitioner, as to the corpus of the property in the possession of the Society; and the policy of insurance is in effect a deed of trust, when read in connection with the acts under which the Society is incorporated, and its charter and rules.

I. *The contract between the parties.*

The petitioner was incorporated under the Act of June 24, 1853, Chapter 555 of the Laws of New York. With its amendments, it forms a comprehensive body of laws for the creation and control of life insurance companies. The parts of this Statute and of the charter which the petitioner filed, that are directly relevant to this discussion, are the following:

By the 71st section of the Insurance Laws, it is provided that:

> "No such corporation shall transact any business of insurance until, if a stock corporation, the capital has been fully paid in in cash. * * * The securities deposited pursuant to this section shall be held by the Superintendent *in trust* for the benefit and protection, and *as a security* for the policyholders of the corporation."

As the capital stock of this petitioner was $100,000 all of this sum was deposited as security aforesaid, with the Comptroller.

By Article III of the Articles of Incorporation, it is provided:

> "The holders of the said capital stock may receive a semi-annual dividend on the stock so held by them, not to exceed 3½ per cent. of the same, such dividends to be paid at the times and in the manner designated by the Directors of said Company. *The earnings and receipts of said Company over and above the dividends, losses and expenses shall be accumulated.*"

By Article IV it is provided:

> "At any time hereafter the Board of Directors, after giving notice at the two previous stated meetings, may, by a vote of three-fourths of all *the Directors, provide that each life policyholder, who shall be insured in not less than five thousand dollars, shall be entitled to one vote at the annual election of Directors,* but such vote shall be given personally, and not by proxy."

By Article VI it is provided:

> "The insurance business of the Company shall be conducted *upon the mutual plan.*
>
> * * * * * * * * *
>
> The officers of the Company, within sixty days from the expiration of the first five years from December 31, 1859, and within the first sixty days of every subsequent period of five years, shall cause a balance to be struck of *the affairs of the Company, which shall exhibit its assets and liabilities, both present and contingent, and also the net surplus, after deducting a sufficient amount to cover all*

outstanding risks and other obligations. EACH POLICYHOLDER SHALL BE CREDITED WITH AN EQUITABLE SHARE OF THE SAID SURPLUS. Such equitable share, after being ascertained, *shall be applied* to the purchase of an additional amount of insurance (payable at death, or with the policy itself), expressing the reversionary value of such equitable share, at such interest as the directors may designate, or if any policyholder so direct, such equitable share of surplus shall be applied to the purchase of annuity, at such rate of interest as the directors shall designate, to be applied in the reduction of his or her future premiums. In case of death, the amount standing to the credit of the party insured, at the last preceding striking of balance as aforesaid, shall be paid over to the person entitled to receive the same; and the proportion of surplus equitably belonging to him or her, at the next subsequent striking of balance, shall also be paid, when the same shall have been ascertained and declared.

In case of the death of any party insured prior to passing any period for striking of balance, as aforesaid, the Board of Directors may provide what (if any) share of such surplus shall be paid to such person."[1]

By an act passed in 1872,[2] "Any domestic life insurance corporation may ascertain at any given time, and from time to time, the proportion of surplus accruing to each policy from the date of the last to the date of the next succeeding premium payment, or may distribute the proportion found to be equitable either in cash, in reduction

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[1] Page 39 of Record.

[2] Chap. 100, General Laws of New York, 1872.

of premium or in reversionary insurance, payable with the policy, and upon the same conditions as therein expressed at the next succeeding date of such payment, notwithstanding anything in the charter of such corporation to the contrary."

The provisions of the Charter in relation to surplus are incorporated in the conditions printed in the policy,[1] as follows:

> "6 *This policy, during its continuance, shall be entitled to participate in the distribution of the surplus of this Society, by way of increase to the amount insured, according to such principles and methods as may, from time to time, be adopted by this Society for such distribution, which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract, but the Society may, at any time before a forfeiture, upon the request of the person holding the absolute legal title to this Policy, substitute a cash payment, to be fixed by said Society, in lieu of the said increase to the amount insured, and such payment may be made by reduction of subsequent premiums, if said policyholder shall so elect.*"

II. *No other relation but that of trust can be evolved from the foregoing documents.*

An analysis of the relations which the three parties involved in this controversy bear to each other, namely: (1) The Equitable Life Assurance Society; (2) its stockholders, and (3) the policy holders, results in establishing that in equity and public policy, *all of the property* of the Society save $100,000 is held by it as trustee for the benefit of

[1] Page 47.

the policyholders. It is in substance, and in equity no different from any other individual or corporation trustee. The Equitable was incorporated to effect insurance upon the mutual plan.[1]

It became the agent and trustee of all of the policyholders. Its stockholders have a right to receive only seven per cent. dividends, and the return of the hundred thousand dollars which was originally put in as capital; the word "capital" being quite inappropriately used, because the hundred thousand dollars was in its real nature and purpose a *guarantee fund exacted by the State* that an insurance company on the mutual plan was to be started in good faith, and was not a mere bubble or fraudulent scheme for attracting insurers.[2]

The Society is the instrument, trustee or agent, into whose hands are committed the collection, investment and division of the money of the policyholders. Every dollar, therefore, of the money which has been accumulated by it, has been received from the multifarious insurers, upon direct representations that their money was to be accumulated, and eventually to be divided in some form among them, for their sole benefit. It is stamped with an ineffaceable trust. It was not the money of the stockholders by which the business of the Equitable Company has been established. *Their so-called capital has been under lock and key in the office of the Comptroller.*[3]

It was the money of the policyholders that has reared and established this magnificent business.

The Society has only a formal title to the property accumulated. A more sacred trust cannot be

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[1] Record, fol. 116.

[2] See article in Green Bag, June, 1905.

[3] Sec. 71, Insurance Laws of N. Y.

conceived than that which arises from insurance. It is deeply grounded in the public policy of all nations, resting upon the strongest ties of affection, and the noblest impulses of mankind.

In the petition of the directors referred to in the Frick report,[1] it is said: *"We have become convinced that its continued welfare and progress,* AND THE DUE ADMINISTRATION AND PROTECTION OF THE TRUST FUNDS IN ITS CHARGE *render a change necessary."*

The mutual life insurance business is a great public trust, and between a policyholder and a company created for the purpose of insuring his life there is the purest and completest fiduciary relationship, and these things being shown, all of the remedies which a court of equity furnishes for a violation of a trust, will naturally follow and be promptly and fully applied.

Lord Hardwicke, in 1742, laid down the rule that:

> "The tribunals of this Kingdom are wisely formed both of courts of law and equity, and so are the tribunals of most other nations; and for this reason *there can be no injury, but there must be a remedy in all or some of them;* and, therefore, I will never determine that frauds of this kind are out of the reach of courts of law or equity, for an intolerable grievance would follow from such a determination."[2]

And this principle has been applied, whenever necessary to all of the complicated and various transactions of life, and it cannot be questioned.

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[1] Page 102.

[2] Charity Corporation vs. Sutton, 2 M. & K. R., 406; more fully in 9 Mod. R., 349.

It would, indeed, be a sorry spectacle in the history of jurisprudence, to have a Court of Equity throw up its hands and say it had no power to correct abuses such as are disclosed in this record.

A trust is defined as an obligation arising out of a confidence reposed in one who has the legal title to property conveyed to him, that he will faithfully apply and deal with such property according to the confidence reposed.[1]

> "Bouvier's Law Dictionary defines trusts as follows: 'First, trust is an equitable right, title or interest in property, real or personal, distinct from its legal ownership; or it is a personal obligation for paying, delivering or performing anything, where the person trusting has no real right or security, or by that act he confides altogether to the faithfulness of those intrusted.'
>
> "A trust is a right of property, real or personal, held by one party for the benefit of another. One of the essential features of a trust is the creation of an estate or principal sum from which rents or profits may be derived that may be used for the benefit of another."[2]

No definitions could more accurately define the relation of insured and insurer. There are three elements in a trust; namely, a trustee or agent; a beneficiary; and an estate. Whether it is called an agency or trusteeship is immaterial. In either view, the basis is the trust reposed. A policy of insurance is in substance A TRUST DEED, all of the beneficiaries being named therein with an express obligation on the part of the trustees to carry the same into effect. A policyholder places his money with a life insurer upon the trust and in the confi-

[1] 28 Am. & Eng. Ency. of Law, page 858.
[2] Gifford vs. Rising, 51 Hun, 3.

dence and belief that his money will be invested, accumulated and eventually paid to the proper beneficiaries.

> "In the management of this fund the Company acts as the agent in a limited sense, of the policyholders and owes them the duty of keeping a correct account of the *fund*. It refuses to render that account, and seemingly takes the position that the policyholders have no right to an account. Jurisdiction in this class of cases, depending as it does, not so much on the absence of the common-law remedy, as upon its inadequacy, is exercised largely as a matter of judicial discretion, influenced by the particular circumstances of each case and the conduct of the parties."[1]

The Circuit Court in the case at bar, said:

> "*Undoubtedly an element of trust* and confidence is present in an arrangement by which life insurance becomes payable by the assured with the imposed conditions."

This concedes the entire principle for which we contend. How *much of an element* the learned Judge did not say. Trusts are not weighed by the pound or measured by the yard. If the germ is there it permeates the whole business. Like the mortal wound of Mercutio, though not as deep as a well or as wide as a church door, the admission is a death blow to the Petitioner's contention.[2]

Not one dollar of the vast property which the petitioner has in its possession has come to it except through the money of the policyholders. Not a farthing has been made by the employment of the Society's so-called capital. That, we have shown,

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[1] Per Wallace, J., Fuller vs. Knapp, 24 Fed. Rep., page 104.

[2] Folio 192, Record.

is locked up with the officers of the State of New York. The Society is no more able, with its own funds to meet the daily demands made upon it, than a village bank could conduct and liquidate the finances of the United States Government.

The fundamental error into which the Circuit Court fell in deciding this case upon the demurrer is contained in these few words:

> "If a contract of insurance is broken by the insurer it may not be inapplicable to state that there was a breach of trust in a broad sense, although the remedy to enforce the liability of the company would not be for a fiduciary debt. The rights and liabilities out of such a relationship spring entirely from the contract and are simply those of creditor and debtor."[1]

There can be no dispute that without the policy the complainant would have no standing here whatever, but the learned Court has placed a wholly unnatural and erroneous construction upon the words "contractual" and "contract" and the effect to be given thereto, and bases its arguments in support of this proposition upon an entire misconception of the respondent's rights and the defendant's duties. If this were an action on the policy to recover its face value, the above remarks might be applicable; but by this suit the policyholder seeks to protect the corpus of property and its surplus from decimation or even destruction, so that when the policy becomes due there will be something to liquidate it with. It is contended that because the rights of a *cestui que trust* are based upon contract, there is no trust; that the tie between the parties is that of debtor and creditor. From these premises it is argued that no trust exists, and this

[1] Record, folio 192.

view was erroneously adopted, as the Circuit Court of Appeals held, by Judge Hazel, in sustaining the demurrer to the bill. He said: "The rights and liabilities out of such a relationship spring entirely from the contract and are simply those of creditor and debtor."[1]

All trusts spring from contracts, either express or implied. One can hardly imagine a trust which is not based upon some kind of contract. But because there is a contractual relation at the inception of a transaction, it does not follow that there is no trust. So, in respect to the relationship of debtor and creditor, so often referred to in the brief of the petitioner, and in the cases cited it is manifest that such a relation exists in every trust. The trustee is a debtor and the *cestui que trust* a creditor, which is more plainly illustrated where a claim to recover simply money is made. The *cestui que trust,* as a creditor, can sue the trustee as a debtor either in law or equity as circumstances justify. It is by the misuse, misunderstanding or misapplication of these terms "contractual relation" and "debtor and creditor" that confusion has been introduced into this discussion, and it is only when they are properly applied that the subject can be approached with clearness. Starting out, then, with the admission that a contractual relation can exist between a trustee and a *cestui que trust,* and that in case of breach of contract, or delinquency, they become debtor and creditor, the question is: "What is the contract between the insured and insurer in this case?" The fate of the case rests upon the statutes under which the corporation was organized, its charter, and the provisions of the policy of insurance. *They all together constitute one contract.*

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[1] Record, fol. 193.

The face of the policy of insurance is simple and clear. In consideration of the insured paying $649.75 yearly, the insurer promises to pay to certain persons therein named, $25,000 within sixty days after the death of the insured. By Article VI of the charter, "The insurance business of the company shall be conducted UPON THE MUTUAL PLAN." Mutual insurance has been defined and described as follows:[1]

> "Mutual life insurance, then, is a joint enterprise, wherein a great number of people deposit large sums of money for investment, which sums, with their accumulations, are to be paid out again to them, not altogether in proportion to the amount of their individual deposits, but in part, so that the longer lived get less for their money than do those who die first. THE ENORMOUS ACCUMULATED DEPOSITS OF THESE POLICYHOLDERS ARE MANAGED BY PERSONS WHO HAVE NO INTEREST IN THE PROPERTY BY WAY OF OWNERSHIP."

Here is the gist of the discussion.[2] A clear declaration appears in the charter that the insurance is on the mutual plan—which of itself is enough to create a trust, because it is provided in Article III of the Charter that "the holders of the said capital stock may receive a semi-annual dividend on the stock so held by them, not to exceed three and one-

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[1] See article in Atlantic Monthly, January, 1907.

[2] "The Company, as a Mutual Company, is bound to treat the accounts of its policyholders as if they were *cestui que* trusts. Everyone who assumes for pay to handle the funds of another to a specific end ought to be supposed to keep accounts and not to mingle them so as to balk every reasonable effort to get at just what is owing. The surplus of a mutual life insurance company belongs equitably to the policyholders who contribute to it in the proportion to which they contribute." U. S. Life vs. Spinks, 96 S. W., 889; 29 R., 960.

half per cent. of the same. * * * *The earnings and receipts of said company over and above the dividends, losses and expenses,* SHALL BE ACCUMULATED." The organic law of the company, thus created a broad and deep division line, between the stockholders and the policyholders.

For whom shall the earnings be accumulated? The stockholder's proportion of the earnings is fixed and he is eliminated. Therefore the accumulations are, *ex vi termini,* for the benefit of the policyholders.

The defendant Society is not incorporated for any commercial, industrial or mercantile purpose, and the money which the law compelled it to put up before it began business was in no real sense of the word "Capital." In ordinary commercial corporations the general rule is that the capital need not be paid in, or if paid in, it may be paid in in property, because generally the object of the incorporators is to use it in the business. It is true that under the Charter the $100,000 which the company was to keep invested in securities was called "capital;" but it was in no proper sense capital, because the capital of a company is the money or property necessary to transact its business. This money was to be held by the Comptroller of the State of New York, as security for the policyholders, with a bare right on the part of the insurance company to draw limited dividends. The object of a commercial, mercantile or industrial corporation is to make money *by the use of its capital* for the benefit of its stockholders and each stockholder is entitled to an aliquot part of the earnings of the company, in the proportion which his share bears to the whole number of shares. The great aim of a commercial corporation, is to make and distribute money among its stockholders. For that purpose it hazards its

capital, its surplus and all of its accumulations, and, within the limits of its charter, the Legislature undertakes to exercise no control over its ventures. Petitioner endeavors to establish a parallel between a commercial or industrial corporation, and a life insurance company. The effort is vain. An insurance company to conduct business upon the mutual plan is incorporated, because it needs a form by which it is enabled to transact its business, with facility, during its perpetual life; it acts through its trustees, and manages the property committed to its hands by the policyholders with ease, because it is a corporate entity. A company incorporated to do mutual life insurance engages in no business by which its stockholders can make money. Contributions are made to its fund by different policyholders, who are continually insuring, and this fund and its accretions, constantly piling up, are held for the benefit of the policyholders, and for no one else. The *property* of the corporation, and the *corporation itself,* are as distinct and separate from each other as the two Poles. The corporation is simply the agent and trustee. It holds the funds of the policyholders, as the custodian of securities might hold them in a box, for the benefit of persons who may have committed them to his care. The corporation here, if all the relief asked for were granted, would still preserve its identity, but it would be shorn of the property of the insured. Its stockholders receive the seven per cent. interest upon the capital invested, which, at the time of the incorporation of this Society, was the legal rate, and they may receive back the $100,000 deposited with the comptroller when, and if, the business is ever wound up.

No doubt a loose idea has grown up that all insurance companies were instituted for gain—

for the benefit of their stockholders; but a flood of light has been thrown upon the objects of insurance within recent years; the scales have been stricken from the eyes of persons running insurance companies, and they now find themselves obliged and commanded to account to the courts and the community by the awakened conscience of the nation, upon the basis of the strictest trusteeship.

As was said by this Court in Pease vs. Peck:[1]

> "When the decisions of the State Court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent."

A Court of Equity will not be slow in executing the moral sense of the people. In Atty. Genl. vs. Looker,[2] the Court held that an insurance company is a corporation public in its character.

Loose thinking upon this matter, not only by the community, but, also, by the Courts, has also been fostered by a failure to give due weight to the provision of the law of New York, permitting the incorporation of Life Insurance Companies as purely stock companies.

The distinction is plain. Under the 12th Section of the Act of 1853, under which defendant was incorporated, it was the duty of the President or Vice-President and Secretary or Actuary, or a majority of the *Trustees,* yearly to prepare under oath and deposit a statement showing in detail the nature of their business, the

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[2] 111 Michigan, 498.

[1] 18, How. 516.

amount of their assets and accumulations, and policies in force, etc. It is thus seen that all of the business of the companies was under the immediate eye of the State; and by Section 13 it is the duty of the Comptroller to arrange these statements and present them, printed, to the Legislature.

The very idea of mutual insurance repels all commercial profit. It is the mutual contribution by different persons to a common fund for their mutual benefit, and by whatever name they have been or may be called, at the basis of the compact there is a fiduciary relation, so broad and deep, that no sophistical differentiation can obscure it. Their money is not in the hands of the insurance companies for the purpose of speculation, or for the purposes of business; it is there by express statute, by the policy of the law, and by the spirit and purpose of the insurance contract, upon trust to be invested in non-hazardous investment securities.

III. *The Society held itself out as a Mutual Company.*

Again. The Organizers of this Society were at full liberty to start it as an absolute and unqualified stock company. They accepted the mutual plan—they advertised and represented the Society *"as an institution which has been uniformly held out to the public as conducted solely on the mutual plan for the benefit and protection of its policyholders."*[1]

These exact thoughts are enforced by Judge Selden[2] in examining the provisions of the Act of 1849, subsequently incorporated into the Act of 1853, under which the Society was organized he says:

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[1] See page 2 of Frick Report.

[2] Mygatt vs. New York Protection Ins. Co., 21 New York, page 55.

"By section 3 of that act it is enacted that persons intending to become incorporated under it 'shall file in the office of the Secretary of State a declaration, signed by all the corporators, expressing their intention to form a company for the purpose of transacting the business of insurance, as expressed in the several subdivisions of the first section of this act, which declaration shall also comprise a copy of the charter proposed to be adopted by them;' and section 10 provides that 'it shall be the duty of the corporators of any and every company organized under this act to declare in the charter, which is herein required to be filed, THE MODE AND MANNER IN WHICH THE CORPORATE POWERS GIVEN UNDER AND BY VIRTUE OF THIS ACT ARE TO BE EXERCISED.'

These provisions confer upon the companies organized under the act a broad and unrestricted power to prescribe for themselves *the manner in which they will conduct the business of insurance.* They virtually transfer to these companies full legislative control over the subject and, construed by themselves, would invest each company, whether joint stock or mutual, with power to provide for every kind of insurance authorized by the act."

IV. *Admission of Society that its property belonged to the policyholders.*

This argument can be more forcibly strengthened, by the attitude assumed by the Equitable Life Assurance Company itself. In two of the most important legal contests which have arisen since it was a Society,[1] the views of the Society have been

[1] Lord vs. Equitable Life Assurance Company, N. Y. Supreme Ct., 2nd Div., Sp. Term, and Appellate Div., 94 N. Y. Supp. page 65; Greeff case 160 N. Y., page 19.

thus set forth by its different counsel in the first named case, counsel saying:

> "In addition to the repayment to the stockholders, in the event of dissolution of the $100,000 of their capital stock it was claimed that the stockholders would be entitled to so much of the 'surplus' of the Society as does not belong to the policyholders by virtue of the existing contracts embraced in the policies.
>
> We do not propose to be led into a discussion of this question, which is a purely moot question, so far as this case is concerned. We concede that the stockholders have an interest in the assets of the Society to the extent of the $100,000 capital stock. Whether they have any further or other interest is wholly immaterial to the questions involved in this suit. *If, however, the Court should consider this question as of any consequence,* so far as concerns the determination of the issues in this suit, *and desires to know what position we take with regard to this matter,* we state what was stated by us in the argument below, *that it is our contention and position that the entire surplus of the society, beyond the sum of* $100,000, *is held for the benefit of the policyholders of the society, and that the stockholders are not entitled to anything out of the assets of the society beyond the seven per cent. per annum guaranteed them by the charter and all the* $100,000 *par value of their stock. All the accumulations and earnings of the society over and above this amount belong to the policyholders of the society in the same manner and to the*

same extent as do the assets of a purely mutual life insurance company having no stockholders at all.

If the Court asks how, in the event of dissolution, an equitable distribution could be made among existing policyholders, and whether the estates of deceased policyholders would have any claim, our answer to this question is that precisely the same problem would arise in the case of dissolution of a purely mutual company. *That there may be difficulty in solving the problem does not prove that the proposition which gives rise to the problem is an erroneous one.*

The charter of the Society provides that 'the insurance business of the Company shall be conducted upon the mutual plan' (Art. VI.), and that all 'the earnings and receipts of the Company after the payment of 7% per annum to the stockholders shall be accumulated' (Art. II.), which, of course, means accumulated for the benefit of the policyholders, just as in the case of other companies whose business is 'conducted upon the mutual plan.'"

It is the position taken by *Counsel for this Society in the Greeff case.*

We quote also from the brief of Counsel for Equitable in the Court of Appeals in *Greeff* vs. *Equitable Life Assurance Society:*

"The defendant's surplus is held for the benefit of policyholders present and future,

and not in any sense for the benefit of the stockholders.

* * * * * * *

"Of course, as this case comes before the court upon demurrer, it is not open for us to show that the far greater part of this so-called surplus belongs to, and is specifically pledged to the tontine policyholders for dividends already earned but the payment of which is deferred to the end of the respective tontine periods.

"A slight consideration, however, suffices to show that neither the stockholders nor the society can have or do have the slightest benefit or advantage from this surplus except as it inures to the security of the outstanding risks.

"The existence of stockholders is because of the peremptory requirement of the general law, which prescribes as a condition of the formation of a life insurance company thereunder that there should be capital stock to the extent of at least $100,000.

"By the terms of the defendant's charter, however, dividends are limited to three and one-half per cent. semi-annually, so that the utmost that the stockholders of the society can draw from its assets during any year is $7,000 (Art. III., fol. 25). This amount is no greater and no less, whether the company's surplus is $10,000 or $40,000,000.

"Nor can there be any room for doubt that, if this society were to stop business and wind up its affairs, the policyholders would be entitled to share in its assets after the repayment to its stockholders of their $100,000 of capital. The company is by its charter or-

ganized upon the mutual principle and the policyholders are the real parties in interest.[1]

And in the Frick Report it is said:[2]

> "It is elementary that a corporation is a trustee for its stockholders, the funds and other property held in the name of the corporation constituting the trust estate; *and where the business conducted is that of insurance the corporation* IS ALSO A TRUSTEE FOR THE POLICYHOLDERS."

From the above bald and broad admissions as to the surplus, it would seem to inevitably follow that the corpus of the property is impressed with a trust in favor of the policyholders.

V. *The present attitude of the Society and its stockholders to the policyholders.*

(a) *The purchase of the Hyde Stock by Ryan.*

This brings us to another phase of the question which is set forth in the Bill, namely, the purchase of the 502 shares of stock from James H. Hyde by Thomas F. Ryan, for $2,500,000. The first step that Mr. Ryan took after becoming the purchaser of the stock, was to execute a so-called trust agreement, dated the 15th of June, 1905 (fol. 149 *et seq.*), which contains these clauses:

> "WHEREAS, the directors of the Society have adopted a plan for the mutualization of the So-

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[1] Art. VI. of Charter, fol. 35.

[2] Frick Report, page 25.

ciety by so amending its charter that of 52 Directors of the Society 28 should be elected by the policyholders and 24 by the stockholders;

"AND WHEREAS, the consummation of said plan of mutualization and formal action thereon by the Superintendent of Insurance of the State of New York have hitheto been prevented by litigation, and in order to effect, so far as practicable and without further delay, the result sought to be attained by such plan of mutualization, the party of the first part has entered into this agreement with the trustees (fol. 150), who shall 'so vote on said stock that out of every thirteen persons for whom such vote shall be cast seven (7) shall be policyholders of the Society, selected in accordance with the wishes of the policyholders of the Society, expressed as hereinafter provided, and the remaining six (6) directors shall be selected by the trustees in their uncontrolled discretion, to the end that of the entire fifty-two directors, twenty-eight (28) shall be policyholders of the Society, selected by or on behalf of the policyholders, and twenty-four (24) shall be lawfully eligible trustees selected by the Trustees in their sole discretion'" (fols. 153-154).

Looking at this extraordinary paper from a technical standpoint it is without consideration. While a voluntary trust, without consideration, which has been accepted may in some cases be upheld, yet Mr. Ryan does not undertake to dispose of his whole interest—he reserves *his property rights* in the stock, and only attempts to dispose of the power of voting. It becomes, therefore, a

more revocable license not covered by the law under which it was assumed to be authorized.[1] If Mr. Ryan sold his stock, which he can do at any time, the purchaser would not be bound. On the face of the very statute under which the agreement is purported to be drawn, the law limits its duration to five years. And he binds himself to confer the power for an additional five years. That which the statute forbids being done directly, he seeks to do indirectly.[2]

In a practical business sense the query suggests itself, why should Mr. Ryan pay $2,500,000 for 502 shares of stock which was only worth $50,200 or at the utmost $100,400, figuring a 7 per cent. stock as worth $200? Undoubtedly he believed **that the stock was worth a great deal more, either through the control of the company, or by the assumed right of the stockholders to a proportion of the assets and surplus of this corporation.** The control of the enormous funds of this Society is worth a great deal of money, as recent history has shown, if it is managed for the interest of the persons who hold the stock, to the exclusion of the rights and interests of the policyholders; but the control of the stock, when used, as it is bound to be in equity and morals, for the sole benefit of the policyholders, is worth nothing except a return of seven per cent. interest on the 502 shares, plus **a world of responsibility, care and anxiety.** For who would assume

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[1] §57 N. Y., Stock Corporation Law.

[2] The fate of such agreements is seen in the case of Sullivan vs. Parkes (69 App. Div., 221), where the court refused to enforce one.

to administer a great and sacred trust, such as is involved in the affairs of this Society, for the pittance which he would receive in the form of seven per cent dividends?

Then who has to pay the Trustees? When and how much are they to receive?

It is apparent, therefore, that from this purchase Mr. Ryan expected some day to realize the $2,500,000 which he placed in this stock, with all of its interest and accumulations or at least the equivalent.

Accordingly we have the Society under the control and domination of Mr. Ryan; we have a change from James H. Hyde to Mr. Thomas F. Ryan; we have no mutualization in theory or in substance; and unless the Court intervenes, the Society is still under the domination of the stockholders, who dictate its Board of Directors, and who wi use it, naturally, in their own interests, and ultimately secure as large an amount of the property of the Society as possible. No mutualization or real democracy is evolved out of this business. The choice of the policyholders must always be filtered through the minds of trustees, chosen by Mr. Ryan, and there is no appeal from their decision. True mutualization means the right of each policyholder to cast his own ballot. The trust agreement was a sop to appease public sentiment. It has signally failed.

Again, the method of the policy-holders giving their assent to Directors is impracticable and *absurd.*

We are warranted in saying it is a blind.[1]

We do not ask the Court to take our views of this transaction. We point to a third person,

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[1] See it set forth at fol. 154.

whose judgment in this respect must be accepted as final, because he is an officer of the State of New York, chosen wholly to look after the interest of life insurance in this State, and who acted under the spur of an incensed public opinion. We speak of the Superintendent of Insurance. He made a report to the Governor on the 20th of June, 1905, annexed to this Bill, and behold what he says of the attempt of Mr. Ryan:

> "During the progress of this investigation, a change in the stock control of the Society has been made, and three trustees have been empowered under a deed of trust to partially mutualize the Society; that is, it is provided that 28 of the directors should be elected by the policyholders and 24 by the stockholders, with the promise that there would be a reduction in the expenses of the company, and that the managers would institute other reforms in the management of the Society which would inure to the benefit of the policyholder. I do not question but what this is the honest intention of those who have acquired the control of the stock of the Society. I do not think, however, that this will go far towards restoring the confidence of the present policyholders or aid in procuring new business for the Society. In my opinion, the only thing that will restore that confidence *and benefit the company will be the elimination of stock control, and,* **what I deem of equal importance, the elimination of Wall Street control.**
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> * * *
>
> *No superficial measures* will correct the existing evils in this Society. *A cancer cannot be cured by treating the symptoms. Com-*

plete mutualization with the elimination of the stock, to be paid for at a price only commensurate with the dividends, is, in my opinion, the only sure measure of relief."[1]

A Court of Equity, if it is convinced that no adequate remedy exists for a policyholder, has the power to relieve him. The statement of the principle involved, by the Circuit Court of Appeals in the 3rd Circuit in the shipbuilding's cases, U. S. Shipbuilding Co. vs. Conklin, is most helpful upon this question.[2] Judge Acheson, in that case, said:

> "But the bill of complaint * * * sets forth a case cognizable by the Court under its general equity powers. The bill not only alleges that the defendant corporation was insolvent, but, as we have seen, it charges that such insolvency was produced by the gross mismanagement of its directors; and furthermore, the bill charged the director with positive misconduct involving breach of trust. Insolvency of a corporation, coupled with gross mismanagement of its affairs by its board of directors, and such misconduct of the directors as is here charged, justify the appointment of a receiver by a Court of Equity independently of any statutory authority" (citing cases).

Now, we have the fact revealed by this record that all of the wrongs, and all of the fraud and waste, which have been committed in the Society, have been the result of *a government by stock-*

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[1] Hendricks Report, pages 54-55.

[2] U. S. Ship-building Co. vs. Conklin, 126 Fed. Rep., page 132.

holders. In a word, they are answerable for the present condition of affairs in this corporation. The Society is still controlled by stockholders, many of whom were such during the whole history of the wrongdoing set forth in our bill. The policyholders can obtain no adequate relief except from the intervention of this Court. Through it real mutualization can be accomplished. It cannot and will not be accomplished by the stockholders.

Under the allegations of the Bill we find Mr. Thomas F. Ryan in control of the Society as the Majority Stockholder; we find him in that position as the result of his paying an enormous sum for the shares—*either because* he believes he can realize the same from the assets; or because he believes the possession of the assets is equally valuable.

It is therefore of vital moment to the policyholders of this company that this court should finally and definitely declare that the stockholders have no interest in the property of this society except a dividend of 7 per cent. and a return of the $100,000.

(b) *The stockholders' attitude towards the policyholders.*

It is alleged in the Bill,[1] that the Stockholders have instituted proceedings, through one Lord, to prevent certain amendments to the charter of the Society, and publicly claim, not only ownership of the $10,000,000 of surplus which is referred to in the 5th paragraph of the Bill, but they claim the right to one half of the entire surplus of $80,794,269, as against the policy holders; and others of the stockholders claim that they are entitled to the whole of said surplus of

[1] 5th Paragraph, Subdivision A, page 15, Record.

$80,794,269. Lord's counsel in that case[1] made the following claim:

> "At the present time the gross assets of the Company are sufficient to provide for all its debts and liabilities, actual and contingent, to abundantly secure and cover all liabilities to its policy holders, and as such policies shall mature and become payable, to pay the same off according to the terms of the said policies, and thereafter to provide and leave a large surplus of assets, greatly exceeding the said original capital of $100,000, *to which surplus and assets thus remaining after the full satisfaction of the said policy holders, according to the terms of their respective policies, the holders of the shares of stock of the defendant (Society) are lawfully entitled.*"

(c.) *Mr. Ryan makes an indirect and insidious attack upon the rights of the policyholders: the stockholders, on the other hand, in the Lord suit, make no bones in claiming everything in sight.*

(d.) *Apart from the foregoing, there was a distinct agreement to set aside a separate and definite fund for the stockholders which constitutes a lien in equity which will be enforced and protected.*[2]

Assuming, therefore, for the purpose of argument, that the Society has a proprietary interest in the funds in its hands, and by it the parties are constituted creditor and debtor as to each other,

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[1] Lord vs. Equitable Society, Brief of Respondent on Appeal to Appellate Division, 126 App. Div., 937.

[2] The surplus is set aside under the charter by command of law and in pursuance of agreement with policyholders. It thus becomes a fund for the benefit of the latter impressed with a trust which equity will enforce as it did in Ketcham vs. St. Louis, 101 U. S., 306.

upon well settled grounds of equity this surplus is notwithstanding a security for their benefit; it is impressed with a lien in favor of the insured, and he has a clear right to an accounting, and to preserve the property covered by his lien from fraud, misappropriation, diminution, waste, or destruction, by the society.

The principle is laid down in Pomeroy[1] as follows:

> "The doctrine may be stated in its most general form that every express, executory, agreement in writing whereby the contracting party sufficiently indicates an intention *to make some particular property,* real or *personal,* or *fund, therein described or identified,* a *security for a debt or other obligation,* or *whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien* upon the property so indicated which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators and executors, voluntary assignees or purchasers or encumbrancers with notice."

This extract is quoted in Walker vs. Brown,[2] where the case of Ketcham vs. St. Louis,[3] which was a case where the subject has been thoroughly considered by this Court—was approved.

Mr. Justice Harlan, who delivered the opinion in the last mentioned case, collated the general authorities in support of this proposition, which we herewith give:

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[1] Equity Jurisprudence, vol. 3, page 1235.

[2] 165 U. S., at page 664.

[3] 101 U. S., 306.

"In Legard vs. Hodges, Lord Thurlow said: 'I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him voluntarily, or with notice, raised a trust. These persons have so claimed; and therefore, this is a pure trust estate,' and they must be declared trustees.[1]

In Re Strand Music Hall Company[2] the question arose whether that company had created a valid charge on their real property. "There can, I think, said Lord Justice Turner, be no doubt that it was intended by these agreements to create a charge upon the property of the company, but it was said on the part of the official liquidator that this intention was not well carried into effect. I apprehended, however, that where this court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it."

The doctrine is thus stated by Mr. Justice Story.[3]

Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate, but on

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[1] 1 Ves. Jr., 478.

[2] 3 DeG., J. & S., 147.

[3] Equity Jurisprudence, Vol. 2, sect. 1231.

personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers or who have notice; for it is a general principle in equity that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust." The author cites, in support of these views, Legard vs. Hodges, supra.

So also, in Pinch vs. Anthony and others, it is stated:[1]

"It is well stated that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property, of which he is the owner, or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons who are either volunteers, or who take the estate on which the lien is agreed to be given with notice of the stipulation. Such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity fulfill it."

In the recent work of Mr. Jones on Mortgages[2] the author remarks: "In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts, which are wanting in one or both of these characteristics of a common-law mortgage, are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their

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[1] 8 Allen, 536:

[2] Vol. 1, sect. 162.

intentions. Mortgages of this kind are therefore called equitable mortgages." So, also, in his treatise on Railroad Securities, p. 57, the same author says: "An agreement of a company to set apart specific earnings or property in the hands of a third person to meet the interest or principal of its bonds, creates an equitable lien or charge."

Again

> "An agreement to turn over net profits establishes not a simple debt, but a fiduciary relation, upon which equitable jurisdiction may be invoked as well as upon cross demands and complexity of accounts." * * *
>
> Story's Equity Pleadings, Tenth Edition, p. 217.

VI. *The Legislature of New York has emphasized the correctness of the foregoing arguments by introducing into the 86th Section*[1] *the following provision*:

> "* * * But the total assets, invested and otherwise of every domestic life insurance corporation, shall be held to be accumulations for the exclusive benefit of policyholders, and no payment to stockholders shall be made therefrom until all obligations to policyholders and creditors have been fully provided for, including the reserve required by Section 84 of this Chapter, to be determined by the Superintendent of Insurance."

This is purely a declaratory Statute and speaks volumes for the correctness of the views herein expressed for Respondent.

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[1] Insurance Laws of New York, 1908, Hamilton.

SECOND.

The Equitable Society, petitioner, is at least a trustee as to the surplus, and is to be held to strict accountability for its non-apportionment, waste or disappearance.

I. *Facts collated establishing a trust upon surplus:*

a. The charter and policy of insurance.

We have referred to the particular articles of the Charter which bear upon these questions, namely: Article III, ante. p. 10; Article IV, ante. p. 10; Article VI, ante. p. 10; and the policy of insurance, ante. p. 12.

It becomes necessary to re-quote parts of these provisions in this connection:

> "The earnings and receipts of the said company *over* and *above* the *dividends, losses* and *expenses, were to be accumulated.*"

What was to be accumulated? The *"earnings* and *receipts?"* What were these earnings and receipts? Everything "over and above dividends, losses, and expenses?" For whose benefit? Certainly not for the stockholders, because by Article VI:

> "The officers of the Company * * * shall cause a *balance* to be struck of the affairs of the Company, which shall exhibit its assets and liabilities both *present* and *contingent, and also the net surplus* after deduct-

ing a sufficient amount to cover all outstanding risks and obligations. *Each policyholder shall be credited with an equitable share of the* **said** *surplus.*[1] Such equitable share, after being ascertained shall be applied to the purchase of an additional amount of insurance (payable at death or with the policy itself) expressing the reversionary value of such equitable share at such interest as the directors may designate; or, if any policyholder so direct, such equitable share of surplus shall be applied to the purchase of annuity at such rate of interest as the directors shall designate to be applied in reduction of his or her future premiums.

In case of death, the amount standing to the credit of the party insured, at the last preceding striking of balance as aforesaid, shall be paid over to the person entitled to receive the same; and the proportion of surplus equitably belonging to him or her, at the next subsequent striking of balance, shall also be paid, when the same shall have been ascertained and declared."

And the business of the company was to be "conducted upon the mutual plan."

b. The nature of the surplus considered.

The financial condition of the Society is to be found on page 13 of the Transcript, and it there appears that the surplus on hand December 30, 1904, was $80,794,269. In the beginning, it is vital to know what is meant by "surplus." Our discussion here is largely taken from paper of well-known Insurance expert. This surplus fund is in excess of the assurance or reserve fund, and

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[1]The policyholders to be credited with what? Of an equitable share of *"said"* NET *surplus.*

all other liabilities set forth in the fourth column of figures on page 13. It is made up only after *all possible contingent liabilities and expenses have been deducted.* Actuarial Experts show that the American Experience Mortality Table is liberal, and provides a reasonable margin of safety running from ten to twenty per cent., above the ultimate experience of the normal company. For example, if 100 deaths have been provided for, only eighty to ninety per cent. occur, leaving a saving from mortality of from ten to twenty per cent. of the expected loss. This saving is perhaps the first element of the so-called surplus. For example, the Commissioner of Insurance of the State of Minnesota, in his preliminary report for the year ending December 31, 1904, states that the expected mortality loss of the Equitable was $15,375,786, while the loss actually experienced was $12,232,822, giving a mortality saving of $3,142,974. The actual loss was then about eighty per cent. of the expected loss, a saving from mortality of twenty per cent. of the expected loss. Then there is a saving in the interest account. The same Commissioner reports for the year ending December 31, 1904, the net interest earnings, that is total interest earnings, less investment expenses, of the Equitable, were $15,013,792, the interest required to maintain the reserve $11,839,010, giving a net gain from interest of $3,174,782. Besides, provision is made for all the running expenses of the company, and this is accomplished by means of "loading" the net premiums, the latter providing only for mortality, while the loaded gross or office premium provides both for mortality and expenses of management. For example, the net premium age 35 for the twenty payment life policy is $29.35, and one-sixth of this $4.98, plus one-sixth of 21, or $3.51, gives a loading of $8.39, which, added to $29.85,

gives $38.34, the premium actually charged. This "loading" is in excess of the actual expenses, and a handsome surplus is derived therefrom. Thus, the Commissioner of Insurance of the State of Minnesota, in his preliminary report for the year ending December 31, 1904, states that the loading expense portion of the Equitable premium is $15,346,022, the actual expenses $13,880,583, leaving a gain from loading of $1,465,439, the expense incurred being about ninety per cent. of the loading provided for same. There are other sources of saving, such as those derived from surrendered and lapsed policies, increase in market value of securities, etc., but from the three sources alluded to in detail above, the Equitable derived in round numbers in 1904 about $8,000,000.

The argument of the Society now is that what they represented and reported to be "net surplus" was not "net surplus." In *argument* they deny the accuracy of their own tables and figures, set forth in the Bill at page 13 of the Record. In face of this position and denial it becomes more important than ever to ascertain what was the real surplus; what sum the policyholders were entitled to.

Hardly any two persons will disagree as to the meaning of "net surplus." It is, however, defined by the VI. Sec. of the Petitioners' Charter. It was the amount left after deducting *all liabilities present and contingent*—all *outstanding risks* and *obligations*.

The obligation to "accumulate" is a command of the charter; the obligation to apportion the "surplus" is a *command of the charter*. They antedate the policy. They are inherent in all insurance made by the Company *and become a most important and essential part of the contract*. The surplus is charged with a trust. It is a separate, distinct fund specially set apart for a determinate

purpose. The Company cannot give it away or incumber it. They cannot even invest it except in securities prescribed by law.[1]

Evolved out of the late mournful history of life insurance, it is almost the unanimous opinion of the best insurance experts, that a large surplus should not be accumulated, but should be distributed yearly among the policyholders.

See also upon this point, the report of the Frick Committee, at page 44. And by the Act of the Legislature of April 27, 1906, amending the Insurance Law of New York, these views have been carried into effect, and it is now provided "* * * that the proportion of the surplus accruing upon said policy *shall be ascertained and distributed* annually and not otherwise.

c. The declaration of the Frick Committee and Superintendent of Insurance, as to surplus.

In the report of the Frick Committee, page 44, it is said:

> "The Society's published report shows a surplus as at December 31, 1904 of $80,794,269; and popular sentiment demands that this enormous sum be divided among the policyholders; there is *even seen a discussion of the ownership of the surplus, as between the policyholders and stockholders.*"

We have already shown[2] that the Society has admitted in open court in the very case relied now upon so largely in Petitioner's brief in the case at bar, that this surplus is the property of the policy-

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[1] Sec. 16, N. Y. Insurance Law.

[2] Ante, page 25 *et seq.*

holders. The same view is adopted by the Superintendent of Insurance of New York, who says:

> "I early came to the opinion and so expressed myself to the Legislature in the Department's annual report this year that all the surplus accretions of this Society beyond the seven per cent. dividends on the stock belong to the policyholders. The charter provides that the business of the Society should be conducted on the mutual plan and provides that each policyholder shall be credited with an equitable share of the surplus. And I am confirmed in my opinion by an examination of the statements that were made early in the existence of this Society to the Insurance Department, verified under oath by the President of the Society, that it was a purely mutual company and that all its surplus should be divided in an equitable manner among the policy holders, *and still further by an examination of the affidavits made on behalf of the Society to the Commissioner of Taxes and Assessments of the City of New York, containing the statement that no surplus earnings belonged to the stockholders and that all the accumulations of the Society are held for the benefit of the assured and are free from taxation.*"

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[1] Pages 54-55 of Hendrick's Report.

d. The allegations of the Bill as to surplus.

The Bill alleges that complainant elected to receive his share of said surplus as ascertained from time to time, in reduction of the premium to him on his policy.

The Bill proceeds to set forth that:

> "Although your orator has been paying said premiums * * * for a period of thirty-seven years, during at least thirty-two years of which he has been entitled to *have his full equitable share of the* lawfully ascertained and true surplus profits of the Society applied in reduction of said premiums, yet the *amounts apportioned* * * * *have not been the real amounts of your orator's equitable share* in the *true* surplus. * * *. The said Society * * * *have wrongfully retained, and to the extent of a large sum, fraudulently wasted and misappropriated to themselves as hereinafter set forth a large portion of your orator's equitable share in said surplus.* Your orator has accepted such reductions in premium as * * * assigned to him, solely because of his belief that the officers * * * were acting in a * * * honest manner, and in reliance upon the representations * * * that he was receiving his lawful share of the true surplus, which representations were untrue and fraudulent, and without knowledge by your orator that

they were untrue, or of the facts which are hereinafter set forth."[1]

The Bill then proceeds to show that at the expiration of each year since the incorporation, its Board of Directors have ascertained and entered upon its books a sum alleged to be the *net surplus,* which surplus was ascertained by causing a balance to be struck from its books, which exhibits its assets and liabilities, both present and contingent. and also the net surplus, after deducting a sufficient amount to cover all outstanding risks and other obligations.

> **"This surplus, so ascertained has been reported annually for many years past to the authorities of the State of New York, and the City of New York by the defendant Society as a fund which belonged to the policyholders exclusively, and one in which the stockholders were without any interest whatever. On the other hand, in its dealings with its policy holders the said defendant illegally claims that such surplus belongs to its stockholders. It has juggled with the surplus to suit occasion without regard to law or right."**[2]

The Bill then avers that the officers have not complied with the requirements of the charter; that

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[1] Record, fols. 25 & 26.

[2] Fols. 27-28.

after ascertaining the net surplus, they should apply it by crediting each policy holder with an equitable share and applying the same or permitting the policy holder to apply the same in manner provided by the Charter.

In disregard of the rights of the complainant and other policy holders, and in fraud of the same, the officers of the Society have been crediting and paying to its policyholders from time to time:

> *"Only a portion of this surplus so admitted to exist by the Society, to the whole amount of which your orator and the said policy holders are entitled in equitable proportion."*[1]

It is then alleged that notwithstanding the Society ascertained the surplus, they have not paid the same to the policy holders whose policies mature from time to time.

> "But have retained a large portion of the said surplus in their possession, uncredited and undivided * * *. On the contrary, the stockholders claim and threaten to appropriate such surplus as a dividend or earning upon the shares of stock of said Society."[2]
>
> "The additional amount of the said surplus so withheld and to which your orator is now justly entitled to credit and payment largely exceeds the sum of $2,000, exclusive of interest and costs of this litigation."

The Bill then sets forth, in five columns, the figures taken from the books of the Society, which

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[1] Fol. 30, Record.

[2] Fol. 31.

show the net surplus,[1] and it is averred that the assets set forth in the 5th column, set aside as a surplus fund, were not necessary to be kept or reserved for the payment of its liabilities in ordinary course; and it is specifically averred that

> "THE AMOUNT OF THE GROSS ASSETS OF THE SOCIETY, APPORTIONED IN SAID FOURTH COLUMN AT THE CLOSE OF EACH YEAR AS THE ESTIMATED AMOUNT TO COVER THE INSURANCE FUND AND OTHER LIABILITIES, IF TRUTHFULLY STATED AND VALUED, WOULD BE, AND ALWAYS WOULD HAVE BEEN, AMPLY AND COMPLETELY SUFFICIENT TO MEET AND DEFRAY ALL LIABILITIES OF SAID SOCIETY, AND IF SAID ASSURANCE FUND HAS BEEN TRUTHFULLY STATED AND VALUED THE AMOUNT SET ASIDE AS SURPLUS IS, AND ALWAYS HAS BEEN, THE REAL SURPLUS AND NOT NECESSARY TO BE KEPT OR RESERVED AS A PROVISION FOR THE PAYMENT OF THE LIABILITIES OF THE SAID SOCIETY, PRESENT OR PROSPECTIVE."[2]

It is also alleged that the *retention of the aforesaid surplus was not necessary for the prudent management of the Society's affairs,* the officers of the Society having ascertained each year the entire *amount of its liabilities, both present and contingent,* and *having set aside the reserve fund as re-*

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[1] Page 13 of Record.
[2] Fol. 34, Record.

quired by law, as well as the fund to cover contingent liabilities for such purposes, every year, over and above this fund stated to be surplus.[1]

It is then alleged[2] that certain of the stockholders not only claimed ten millions of said surplus, but one-half of the entire surplus reported in the year 1906, namely, $80,794,269, and certain other stockholders have made claim that the whole of said surplus belongs to them.

The Bill further alleges that the object of retaining the surplus from the policyholders has been:

> "with the deliberate and fraudulent design and intent to enable the said Society, its officers and stockholders * * * to set up and assert such claims as have been hereinbefore described and stated; and with the further purpose and intent to pile up a great fund under the control of the said Society and its officers and its stockholders, not needed for any legitimate purpose of the Society or the protection of its policyholders, *but by the use of which the said Society, its officers and stockholders, could secure illegal and personal gains, and out of which the said Society, its officers and stockholders, could distribute to and among themselves, under pretence of payment of salaries and expenses,* improper and extravagant disbursements, and out of which your orator avers that they have secured such personal gains and have distributed to themselves improper and extravagant salaries, commission and expenses, as hereinafter set forth and averred, and which belonged to and should have formed part of

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[1] Fol. 41, Record.

[2] Subdivision A, 5th Paragraph of the Bill, page 15 of Record.

such surplus; and the said Society, its officers and stockholders, publicly assert their intention to continue the violation of their said charter obligation and of not crediting and distributing among the policyholders of the said corporation more than a portion of said surplus fund if they continue in the management of the assurance funds held as aforesaid."[1]

e. The claim of stockholders to $10,000,000 *of surplus.*

Distinct averments are made as to $10,000,000 of the surplus, to which it is most important to call the attention of the Court. The facts are set forth in Paragraph 5 of the Bill, as follows:

"Fifth.—Your orator avers that of the aforesaid surplus, a sum approximating $10,000,000 is held by the Society, in which sum the policyholders, according to the claims now set up by said Society and its stockholders, despite their aforesaid reports to the authorities of the City and State of New York, have and can have no interest under the rules and regulations for the division of surplus as adopted by the Society's officers for the ascertainment of the equitable shares of the surplus due to each policyholder, if such rules and regulations are now or ultimately applied to the distribution of the said surplus; and the Society has publicly declared that even if the existing policies had been credited annually with the equitable shares of the surplus to which each was entitled under the rules and regulations adopted by the Society's offi-

[1] Fol. 45.

cers for the distribution of such surplus, there would still remain a sum in the neighborhood of $10,000,000 which could not and would not be so appropriated under such rules and regulations, and your orator avers that such statements accurately set forth the claims now advanced by the Society, its officers and stockholders, as to said approximate amount of said surplus fund, and also the results to policyholders of the inequitable rules and regulations adopted by the officers for the distribution of surplus."[1]

It is further averred in the Bill that in the Lord suit, it is publicly claimed that Lord, who is mentioned as a stockholder, asserted a stockholder's ownership and right to the whole of the above mentioned sum of about $10,000,000 of said surplus.

The Bill finally alleges upon this question of surplus:

"That for a long time previous to the date of the filing this amended bill all the dealings and sales in the shares of the defendant Society have been based upon the illegal, false and fraudulent assumption that the stockholders of the Society were entitled to all, or a large proportion, of the accumulated surplus. Although the dealings in the shares were infrequent, it was assumed by the sellers and purchasers of such shares that not only the majority holding of shares of the defendant Society, but also all the individual shares were of enormous value; and that, in addition to giving the holder a majority of such shares the absolute control of the Society and its

[1] Fols. 41-43, Record.

great property, the shareholders would eventually receive millions of dollars as dividends from the said wrongfully accumulated and undivided surplus, which would eventually be distributed amongst them, and not among the policyholders."[1]

f. The arguments of petitioner examined upon this question.

The petitioner relies solely upon the Uhlman case[2] and the Greff case.[3] We have endeavored to show at the beginning of this brief that both the Uhlman and Greff cases are pointedly in favor of the respondent. In the Uhlman case the Court took special pains to emphasize the fact that upon the trial plaintiff *abandoned all allegations as to any misappropriation of the fund or any wrong whatever,* and to knock on the head the present claim of the Society that it possessed a tyrannical power in reference to the distribution of the surplus by saying:

> "The plaintiff and all others similarly situated have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable or has been based upon erroneous principles, to have a trial and make proof of such allegations."

Directly after the decision in the Uhlman case was made, the Society, **apprehensive lest some policyholder should frame a complaint in accordance with the suggestions of the Court in the Uhlman case, procured passage of the Act of Sec. 56 of the Insurance Law, by which all actions for accountings were effectually shut off.** This action showed that the then policy of the Society and of

[1] Fol. 66.
[2] 109 N. Y., page 121.
[3] 160 N. Y., page 19.

Hyde, who controlled it, was to protect himself effectually against all possible chances of policy-holders discovering the peculations which he was even then perpetrating.[1] So in the Greeff case there was "no allegation of bad faith, wilful neglect or abuse of discretion by the defendant or its officers," and it was also destitute of any allegations which showed the relation of the surplus to the liabilities and general financial conditions of the Society. Judge Martin said:

> "While the complaint alleges that the defendant declared its surplus to be more than forty-three million dollars, there is no allegation as to the amount of its outstanding policies or the proportion which the surplus bears to the amount of its existing insurance, nor does it show that the surplus is in any way disproportionate or unnecessary to the proper security of the amount of such outstanding insurance."

In the case at bar we have all these allegations fully set forth, and a further distinct averment that this surplus is not in any way necessary to the proper security of the outstanding insurance. Moreover, in the Greeff case the Court held that the 56th Section of the Insurance Law prevented the plaintiff from maintaining an action, which barrier is now happily removed by the repeal of the law. If it were necessary, to add weight to Respondent's case, the general logic and reasoning of the Greeff case may be safely challenged, and we respectfully submit that when this Court compares the opinion of the Appellate Di-

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[1] See the report of the Insurance Commissioner at page 5 et seq. in relation to the formation of Safe Deposit Companies.

vision in that case with the reasoning of Judge Martin in the Court of Appeals, it will be convinced that the former is the more cogent, correct and convincing.

Greeff vs. Eq. Life Ass'ce Co., 40 App. Div., 180.

It is conceded says Woodward J. (at p. 184):

"That the plaintiff stands in a contractual relation to the defendant, and that the defendant has stipulated in its contract that the plaintiff, during the continuance of the policy shall be entitled to participate in the distribution of the surplus of this Society; but it is urged on behalf of the defendant that the plaintiff has forfeited his right to insist upon an equitable distribution of all the surplus by the provision in the policy that the distribution shall be made 'according to such principles and methods as may from time to time be adopted by this Society for such distribution; which principles and methods are hereby ratified and accepted,' etc. The learned trial court has adopted this view of the question, but we are unable to concur in the conclusion that the minds of the parties have met in an agreement that the defendant shall have arbitrary power in distributing this surplus of the Society, to take out two-thirds for the Society and to divide the remainder. The contract was drawn by the defendant, and is therefore to be construed most favorably to the plaintiff where this construction does no violence to the letter of the contract."

The Court then quotes the 6th section of the Charter and further said:

"It (the Society) in fact stipulated with the State as a condition of its being, that it would place in the hands of its policyholders a contract embracing these provisions and it cannot now be heard to

Greef vs. Eq. Life Ass'ce Co., 160 N. Y., p. 17.

Per Martin J.

"So the word 'surplus' is used to designate the amount of funds in the hands of the company after deducting its liabilities as ascertained by certain rules adopted by the Insurance Department for determining the value of each risk. Obviously the word 'surplus' was not used in the defendant's charter or policy to designate the amount of money in the company's hands, which was to be distributed among its policy holders, but to represent the amount which should remain after certain calculated liabilities were deducted. When that amount was ascertained, it became the duty of the officers of the defendant to determine the portion of such surplus which should be distributed and the portion which should be retained for the benefit and security of the company and its members. We find nothing in the policy which requires the defendant to distribute its entire surplus among its policyholders. It is only required to credit to each policy an equitable share of the surplus, after deducting **an amount sufficient to cover all outstanding risks and obligations.** Under that provision the defendant had the right to retain out of its surplus an amount sufficient to insure the security of its policyholders in the future as well as at present, and to cover any contingencies that might arise or be fairly anticipated. Obviously, it could not have been the intent of this provision to require the defendant to distribute its entire surplus, so that any depreciation in its investments or increase of its liabilities by some unusual condition, or any change of the rate of interest in calculating its reserve

say that it has, by a mere jugglery of words kept this promise in form only to defeat it in substance. The substance of the contract as set forth in the policy, construed as it should be in connection with the Charter, is that the plaintiff shall be entitled to an 'equitable share of the said surplus.' If a grocer entered into a contract with his customers to give them an equitable share of the net profits of his business, after deducting enough to pay all of his outstanding and contingent obligations with 7% interest, no one would contend that he was fulfilling that contract if he paid two-thirds of the net profits into a fund for his own use and then divided the remainder."

"* * * * * Equity suggests the highest practical form of justice, and its use in connection with a division of the surplus of the defendant, is a pledge that the funds of the Society, after meeting all of its obligations, shall be distributed among those who have contributed their premiums, on the basis of the amount which they have paid, and the only exception which the Company has laid down for itself is that 'in case of the death of any party insured, prior to passing any period of striking of balance, as aforesaid, the Board of Directors may provide what (if any) share of such surplus shall be paid to such person.' The contract is that 'this policy, during its continuance, shall be entitled to participate in the distribution of the surplus of this Society.' It is not a part of the surplus, but the surplus in which the policy is to share."

"The Company may take all steps which are demanded by wise and prudent management, to insure the prompt payment of losses and to successfully carry on the business, but when it has once determined what the surplus is, it must, under its contract with this plaintiff, make an equitable distribution, not of a portion of the fund, but of all of it."

would, of necessity, render it insolvent."

"The policyholder is to be credited only with an equitable share of such surplus, which must, we think, be regarded such a share as might **with due regard to the safety of all its policyholders, the security of its business, and in the exercise of a proper discretion, be thus credited.**"

THIRD.

Upon either of the above grounds the complainant shows that he is entitled to full equitable relief.

The grounds, among others, upon which this suit is based, are as follows:

I. *Adverse claim by Society and its stockholders as to the title to the surplus.*

a. Setting aside of the $10,000,000 as a distinct and separate fund for the stockholders, from the surplus belonging to the policyholders.

b. The suit of Lord vs. Equitable Society, claiming the surplus for the stockholders.

c. The purchase of the majority of stock of the Society from Hyde by Thomas F. Ryan at a figure which clearly shows that its value is based upon the ownership of the surplus; or the possession of such majority stock carrying with it an illegal and wasteful power over the property of the policyholders for the benefit of the owners of the stock.

II. *Fraudulent conduct in the management of the property and surplus in the hands of the Company and its misappropriation and waste.*

Under this head we beg to call the attention of the Court to the allegations of the Tenth Paragraph of the Bill as follows:

> "TENTH.—As heretofore averred, the said defendant Society, for many years past, has wilfully and negligently failed to properly invest and reinvest the said assurance funds

held for the protection of your orator and other policyholders and annuitants; has continuously and wilfully paid wrongful and extravagant sums out of said funds to its officers and agents; has wilfully and negligently and fraudulently mismanaged, and, through its officers and agents, misappropriated the said assurance funds, and by reason of such waste, extravagance, mismanagement and misappropriation has largely depleted the same. Your orator has no means of knowing the precise amounts of such waste and misappropriations, and he therefore prays for an accounting that the amount thereof may be properly ascertained, and that a decree may be entered herein directing the said defendant Society to repay and refund to the said assurance funds, for the benefit of your orator and the other policyholders and annuitants, the said amounts so wasted and misappropriated when ascertained, with the interest thereon from the dates when the same were so wasted and misappropriated."

And by the Fourteenth paragraph of the Bill it is also alleged:

"FOURTEENTH.—Your orator, further complaining, shows that the capital of the defendant paid in is only $100,000. That the said Society is responsible in law and equity to the policyholders for excessive sums paid in the way of salaries and fees, and also for all sums of money and damages consequent upon fraud, waste, neglect or wilful mismanagement of the property and affairs of the Society. That these sums amount at the present time to many hundred thousands of dollars in excess of the

capital of $100,000, and as to which your orator and the other policyholders are entitled to an accounting, and the Society has no funds with which to meet these enormous losses, but is insolvent" (fol. 90).

The Society is responsible to the policyholders for any impairment, waste or loss of the property entrusted to its care and custody, caused by fraud or gross negligence, and the demurrer admits the allegation above set forth in these paragraphs.

These sums amount at the present time to millions of dollars in excess of the capital of $100,000, and as to which your orator and the other policyholders are entitled to an accounting, and the Society has no funds with which to meet these enormous losses.

We select a few items making up this liability, and showing fraud, mismanagement and waste from the Frick and Hendricks Reports, both of which are referred to in and made part of the Bill (fols. 56-57).

(*a*) It is the duty of the Society to make purchases of securities at the lowest market figure. If the Society, its officers and agents purchase securities through syndicates controlled by these officers and agents at figures higher than the price at which such securities are obtainable by the Society's own officers, the difference in price is chargeable against the defendant corporation, as between the corporation and the insurers.

Thus, in the Frick Report it is set forth:

(1) Metropolitan Street Railway 4's Syndicate (page 9 Frick Report; page 32 Hendricks Report), syndicate profits made by officers of the Society, $30,210.38.

Loss on $1,000,000 of these bonds purchased at 97½, market price at date of Hendricks Report 91¼, $65,000.

(2) Syndicate profits in Phila., Balto. & Washington 4 per cent. Bond and Long Island Railroad 4 per cent. Bond Syndicate made by officers of the Society (page 9 Frick Report; page 33 Hendricks Report), $11,930.55.

(3) Oregon Short Line Refunding Mortgage 4 per cent. Bond Syndicate profits made by officers of the Society (page 11 Frick Report; page 34 Hendricks Report), $25,047.46.

(4) P. C. C. & St. Louis Ry. Consolidated Mortgage Four per cent. Gold Bond Syndicate. Syndicate profits made by officers of the Society (page 12 Frick Report; page 34 Hendricks Report), $10,261.46.

(5) Norfolk & Western Divisional and First Lien General Mortgage Bond Syndicate's profits made by officers of the Society (page 12, Frick Report; page 35, Hendricks Report), $3,758.

(6) Imperial Japanese 6 per cent. Sterling Loan Guaranteed Syndicate, Syndicate profits made by officers of the Society (page 13, Frick Report; page 35, Hendricks Report):

First Syndicate, $25,635.41.
Second " 23,424.00.

Society's loss on Bonds purchased in this Syndicate, $953.

(7) Imperial Japanese Government 6 per cent. Sterling Loan (second series) Syndicate

profits made by officers of the Society (page 13, Frick Report; page 37, Hendricks Report), $62,815.13.

(8) Atchison, Topeka & Santa Fe Debenture Bonds, Syndicate profits made by officers of the Society (page 14, Frick Report; page 37, Hendricks Report), $11,422.

(9) Payment by the Society for dinner given by Mr. Hyde to M. Cambon (page 21, Frick Report), $12,800.

(10) Expenses paid by the Society for Mr. Hyde's traveling expenses, entertainments, expenses, etc. (page 21, Frick Report), $75,000.

(11) Profit on 1,670 shares of the Equitable Trust Company allotted to the Equitable Society at $150, not taken by the Society, but taken by its officers. Profit $233⅓ per share (page 26 of Hendricks Report), $389,666.66 2/3.

(12) Loss to the Society on 10,563 shares of the Equitable Trust Co., acquired on January 27, 1903, and paid for at $500 per share; loss being $116 2/3 per share (page 26, Hendricks Report), $1,232,350.

(13) Pension to Mrs. Annie Hyde, mother of the Vice-President, disapproved of in Hendricks Report (page 46), $25,000 a year since 1900, total $100,000.

(*b*) It is certainly the duty of the Society to use ordinary care to secure a reasonable rate of interest for the insurance funds in its hands. If, for corrupt purposes, it fails to do so and leaves the money uninvested in banks and trust companies in which the officers and directors of the Society are interested, then we take it there can be no doubt that the policyholders could call upon the Society to make good the loss thus occasioned to the insurance

funds. Examples of this liability are the following:

(14) Interest on excessive cash balances.

From page 38 of the Frick Report it appears that the average cash balances from the year 1900 to 1904, inclusive, aggregate $106,214,099.10, at an average rate of interest of 2¼ per cent.

It appears, too, that the percentage of these average balances to total assets is 5.90 3/5. This was the percentage at the close of the year; but the fact is that throughout the whole year it was far more the Society making it a practice to decrease the cash deposits in December for the purpose (it is inferred) of making a better showing to the Insurance Department. (Page 39, Frick Report).

It further appears (page 38 of Frick Report) that other companies had only the following percentage of assets in cash:

Northwestern Mutual	1.84
Connecticut Mutual	1.79
Mutual Benefit	1.26

The Northwestern Mutual apologizes in its report for having so large a sum in the bank (page 38 of Frick Report).

But, taking that as a basis for this table, we find that the Equitable Society exceeded that excess by at least 4.06 3/5 per cent. (taking the average at the close of the year and not the much higher average for the whole year).

Assuming that the Equitable might have earned four per cent. upon these average cash balances, or a difference of 1.75 over the 2¼ per cent. it did earn, we find that there

was lost to the Society in the years 1900 to 1904 inclusive, at least the sum of

1900...	1.75%	on	$16,302,712.07—	$285,297.46
1901...	"	"	$19,395,824.28—	$339,436.92
1902...	"	"	$24,624,746.34—	$430,933.06
1903...	"	"	$24,240,921.36—	$424,216.12
1904...	"	"	$20,849,895.05—	$364,873.16
				$1,844,746.72

We have, on these 14 items alone, a detailed statement of fraud, mismanagement and waste of the policyholders' money on the part of the corporation, of $3,924,720.77, made up as follows:

$30,210.38
65.000.
11,930.55
25,047.46
10,261.46
3,758.
25,635.41
23,424.
953.
62,815.13
11,422.
12,800.
75,000.
389,366.66
1,232,350.
100,000.
1,844,746.72

$3,924,720.77

without including many other items of the same wrongful nature, such as the advances to agents,

not allowed as an asset by the Insurance Commissioners of New York, Massachusetts, and other States, and amounting, on December 1, 1904, to $7,327,824.77.[1]

Nor have we included any items resulting from the breach by the Society of its duty to obtain competent officers and agents at reasonable salaries. If the defendant has negligently or corruptly paid extravagant salaries out of the insurance funds in its hands, the defendant Society as between it and the policyholders is liable therefor.

The exact figure of loss to the policyholders caused by specific allegations of the above character in the bill is unascertainable without the accounting for which the bill asks. Enough appears, however, on the admitted facts in the bill and in the exhibits to indicate that the figure may be anywhere between $5,000,000 and $20,000,000, which, on a proper accounting the defendant Society should be required to repay to the fund held for the policyholders.

On the admissions of this demurrer, these great wrongs have been committed against the policyholders.

A judgment accomplishes the real end at which the policyholders have aimed, and should aim, and which the Superintendent of Insurance says is *"the only sure measure of relief,"*[2] namely, the elimination of the stock control and the mutualization of the Company.

This is the meaning of our charge that the defendant Society is insolvent. We cannot be answered by the absurdity that the Society would be entitled to make good these losses to the policyholders by paying them to the latter out of money already held for the benefit of the policyholders.

[1] Page 36, Frick Report.
[2] Page 55, Hendricks Report.

> "The term insolvent usually means one whose estate is insufficient to pay his debts, *or one who is unable to pay his debts from his own means.*"[1]

It may be suggested that this is not technical insolvency—a present inability to pay debts—on the theory that the debts to which we refer are still unliquidated—that the Society will not owe these vast sums until a decree ascertaining them has been entered against it.

In a suit to remove a trustee or other custodian of funds, the insolvency of the custodian is always adequate ground for his removal. Is not the same reasoning applicable here? Suppose that a trust company with a capital of $100,000 were trustees of an estate of $400,000. Suppose suit were brought to remove the trust company on the ground that it was insolvent. Suppose it should reply that it was not insolvent; that its president and directors and officers had plundered another estate of which it was trustee to the extent of six or seven million dollars, and that suit had been brought against the trust company to recover the funds thus lost, but that the accounting had not been had in that case and the debt had not been ascertained or adjudged.

Would not the position of the trust company, if it admitted the plundering of the estate and the justice of the claim and protested only that the accounting had not been had and the judgment had not been rendered, be precisely the same as that of the defendant in this case?

Would not the insolvency, inevitably sure to result, as soon as the judgment was entered, be a more forcible ground for its removal from the

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[1] Riper vs. Popperhausen, 43 N. Y., at 75. See also Definition of Insolvency in Bankrupt Law of 1898.

larger trust than even a present inability to pay its debts?

We cannot be met by the claim that the wrongs complained of here are wrongs for which only individuals are answerable. That grievance may form the basis for a separate suit or suits. By the Frick report it appears that all of these frauds and wrongs were committed by responsible officers of the defendant. Wherever the wrongs were committed to the knowledge of these responsible officers, the doctrine of *respondent superior* makes the defendant itself liable. To recur to the illustration above suggested: it would be an absurd defense for a trust company charged with the investment and re-investment of funds to say that they had been lost because the president or vice-president or some of the directors had made away with them.

It is abundantly shown in the bill that the defendant has been guilty of fraud, waste and gross mismanagement of the property of the policyholders. The different charges are set forth in the bill and are given in detail in the report of the Frick Committee and that of the Superintendent of Insurance, and it is not necessary to marshal them under specific heads, as they are most prominently treated in the reports above referred to.

These facts fully justify quick and full relief **and such a judgment as will render it clear that the assets held by this Society belong to the policyholders.**

III. *The Stockholders have possession of the Society by virtue of the control of Ryan and hold the surplus adversely to the claim of the policyholders.*

IV. *The policyholders have an equitable lien upon the surplus, it having been a separate and in-*

dependent fund set apart by a distinct and clear agreement between the parties, and a Court of Equity will enforce the lien and protect it for the benefit of the policyholders.

V. *Failure of the Society to make an equitable distribution of the surplus.*

VI. *A resumé of the reasons for the exercise of equitable jurisdiction.*

This bill is an omnibus bill, in behalf of the complainant and such other policyholders as choose to come in. A number of policyholders have already intervened in the suit, and thousands of others stand ready to come in. The effort has been not to crowd the record.

It is quite apparent that for the first time in the history of this country, this Court finds itself face to face with these questions affecting thousands of the citizens, resident in every State of the Union, and elsewhere, some of which have never been determined at all, and others of which have only been superficially examined. The business of insurance is a quasi-public one; no one can successfully urge otherwise.[1]

> *"There is a reason for making a distinction between such insurance companies and other corporations; for the former have characteristics which entitle them to be regarded as almost public in their nature. They are unlike private corporations organized purely for the pecuniary profit of their members and therefore subject to our observations in People vs.*

[1] Swan vs. Mutual Reserve Fund Life Assn., 155 N. Y., p. 376.

*Lowe (supra). Their primary purpose is co-operation of individuals in a plan for the mutual insurance of their lives whereby the cost will be cheapened. * * * Indeed, the objects of life insurance corporations invest them with such a public interest, that the State has placed them within the superintendence of a special department."*

The Bill discloses facts calling for the intervention of the Court upon almost every ground which is known to Equity. We find here a great public trust which has been wrongfully and scandalously administered;[1] we have fraud, waste, prevention of multiplicity of suits, and an inadequate, or no legal remedy, for the parties injured. There are 560,000 policyholders interested in this litigation. There are many different classes of persons whose claims must be reconciled. The Court alone can decide as to the exact meaning of mutual insurance, and as to what constitutes an equitable apportionment of surplus. It must decide as to whether any of the stockholders in this Society are justified in claiming an interest in any portion of the property of the Society, beyond the right to seven per cent. dividends and the $100,000 deposited with the Comptroller upon the winding up or liquidation of the Society. The Court will appreciate the gravity of this controversy by the above statement: it will also see the necessity of the intervention of a Federal tribunal. In this jurisdiction, by virtue of

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[1] Mr. Justice Peckham, in the Uhlman case, did not assume to say the general funds or assets of the Society were not held in trust. He merely said in the light of the facts therein disclosed that as to that *"particular"* fund, the Society was not a trustee to be held accountable in equity without allegations of fraud or wrongdoing.

diverse citizenship and the necessary amount involved, it sits as a Court of Equity, untrammeled by State legislation or State decisions, giving them only such fair consideration as their inherent legal merit admits.

Inadequacy of legal remedy is apparent, for by no possibility can the rights of 560,000 policyholders be adjusted in a court of law; in fact, it would be a crude rule to compel each policyholder to have his rights separately investigated in different courts of law all over the world, and a most unnecessary and terrible burden upon the Society, to compel it to answer the myriads of suits, which would multiply in each tribunal, by a desire on the part of each policyholder to preserve his rights. The Court, in this omnibus suit, has all of the policyholders practically before it; it adjudicates upon all of the questions involved in the record, and its judgment is binding upon all classes, because the objects of the suit are to reach every aspect of the rights of the policyholders and the corporation, and a decree entered in this suit will bind all persons, whether they are intervenors or not, under the familiar decisions which have been so often rendered by this Court. Primarily the effort of the policyholders is to remove the obstacles which prevent the policyholders from sharing the benefits of the legislation of this Sta[illegible]

We have endeavored to show that [illegible] respect to the corpus of the property of this Society, it is impressed with a trust in favor of the policyholders. We have also endeavored to prove that these holders are entitled to participate in the surplus, and that a fair and proper distribution of this surplus has never been made. On the contrary, it has been wilfully withheld from them, and fraudulently

used, for individual purposes of officers and directors of the Society (fol. 45).

Besides, it appears that some of the stockholders are actually in court claiming to be the owners of the surplus of the Society;[1] and it further appears that Mr. Ryan, who holds the majority of the stock, paid $2,500,000 for 502 shares, upon the hypothesis, either that the shares had earned a large sum of money, or that the control of the Society and its funds would be of enormous financial benefit. Either motive is in direct hostility to the true interests of the policyholders. Further, the present controlling stockholder stands in the shoes of his predecessor; he voluntarily assumed such a position, and took it *cum onere*.

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[1]Lord vs. Eq. Life Ass., *ante*, page 16.

FOURTH.

Even if there be no technical trust relation, either as to the surplus or corpus of the property, under the circumstances disclosed in the bill a Court of Equity in an omnibus or class suit will assume jurisdiction, there being no adequate remedy at law, and the suit involving complicated accounts and a multiplicity of suits growing out of the different classes of policyholders interested.

We feel that we need not occupy much space in discussing the proposition. If there be anything settled in the law of this country and of this court it is that the remedy at law must always be plain and adequate and as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.[1]

It is stated by the petitioner that the respondent has a remedy at law. That is no answer to this bill. It is incumbent upon the petitioner to show that the remedy at law is full and adequate, otherwise equity will afford relief.[2] But we deny that the policyholder has any remedy at law whatever. He is not, in the sense in which he appears in this suit, a creditor. Nothing is due to him until his policy matures by death or limitation of time. He is not

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[1] 5th Wall, 78; 3d Peters, 210; 7th Wall, 420; 16 Cyc., 799.

[2] One who is entitled to sue in the Federal Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that Court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State Court on the same cause of action. Smyth vs. Ames, 169 U. S., 516.

entitled to his full insurance unless he keeps up the payment of his premium. The surplus is not paid to him, it is credited either in diminution of his premium or in the increase of the amount of his insurance. To what end should he have recourse to an action at law? It would be well for those who seek to avoid an equity suit by this plea to draw a declaration or complaint. It would be well for them to point out the nature of the action at law which a policyholder could maintain. Would it be an action of assumpsit? An action of debt? An action of covenant? If the insured is not a creditor how could he sue? The policyholder is the debtor until he completes his premium payments. Even after they are completed he has no legal right to sue until his policy matures. In the interim he is a debtor to the insurance company. Can a debtor sue his creditor? It is said that the policyholder may bring an action for damages, for breach of contract to pay surplus. But there could be no proper or adequate remedy in such an action. What judgment could be rendered? The policyholder is only entitled to have his proper equitable share of the surplus applied in diminution of the premiums or to an increase of the principal insurance.[1]

His damages could not be fixed unless the rights of the thousands of other policyholders were examined and adjusted. It is plain that such a remedy would be clearly inadequate. And yet this bugbear has been persistently used to defeat the

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[1] *"It is manifest that by the terms of the plaintiff's policy the only right he acquired was to share in an equitable distribution of the accumulated surplus. Until a distribution was made by the officers or managers of the defendant, the plaintiff had no such title to any part of the surplus as would enable him to maintain an action at law for its recovery."*

Per Martin J., Greeff vs. Equitable Life Assur. Soc., 160 N. Y., at page 32.

policyholder in the State of New York when he sought his rights in equity—that he had a legal remedy. Besides all of this, the present bill specifically aims to have it declared that the property and funds of the Society belong to the policyholders. The insured can have no remedy unless it is in equity. An analysis of his relations to the insurer shows that a legal remedy is impossible, or at least wholly inadequate. What remedy at law would stop or control the acts of the petitioner in misusing, misappropriating, wasting or fraudulently distributing the assurance funds and surplus of the Society?

There are at least 560,000 policyholders interested in this suit, and there are several distinct and different classes. There are the policyholders who have been settled with, and who have surrendered their policies and, yet a full accounting may show, that they have not been credited with the full amount of the surplus. There are annuitants; there are holders of Tontine policies; there are policyholders on the endowment plan, and holders of life policies. There can be no full statement of accounts, without the rights and interests of the several classes are considered and fixed. The accounts of the company run back for years. There is no escape from the fact that the surplus of the company must be found, marshalled and distributed, and that this involves intricacy and complication, as much as any case can ever present.

It is only necessary in this connection to quote Mr. Justice Wallace's views in Fuller vs. Knapp.[1]

> "Upon the case made, they are entitled to a portion of the fund, the amount of which necessarily involves an inquiry as to the num-

[1] 24 Fed. Rep., 100.

ber and amount of the policies of the class of 1874, the dividends which accrued upon them, the number that have been forfeited, or have lapsed by retirement or death, the times when they lapsed or become forfeited, and of the interest due upon the investment of the dividends. In the management of this fund the company acts as the agent, in a limited sense, of the policyholders, and owes them the duty of keeping a correct account of the fund. It refuses to render that account, and seemingly takes the position that the policyholders have no right to an account. Jurisdiction in this class of cases, depending as it does not so much on *the absnece of the common law remedy as upon its inadequacy,* is exercised largely as a matter of judicial discretion, influenced by the particular circumstances of each case and the conduct of the parties."

And in Corey vs. Sherman[1] it was held that a few of two thousand policyholders in an insurance company, all having similar interests, may sue to set aside assessments. And see also McIntosh vs. City of Pittsburg,[2] where a common interest exists one or more of a class may litigate such interest without making all class members parties.

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[1] Iowa, 1894, 60 N. W., 232.
[2] 112 Fed. Rep., 707.

FIFTH.

The decisions in the Uhlman and Greeff cases even if they could be tortured into precedents for Petitioner would not be binding upon the Federal Courts.

If the learned counsel for the Petitioner had not made this question so prominent in their brief—making it their "First Point" and devoting 17 pages to the discussion—we should not have regarded it as seriously insisted upon.

There are many reasons why the doctrine which they contend for is utterly inapplicable in this case:

I. *The Uhlman and Greeff cases are not precedents in favor of the Petitioners. On the contrary, they are authorities in favor of the Respondent.*

(a) *In the Uhlman case the action was in equity for an accounting—upon a single matured policy—by the owner of the policy.*

The *plaintiff withdrew* all allegations of wrongdoing or fraud and the Court held "*Prima facie* the apportionment as made by the defendant should be regarded as a compliance with the terms of the policy, or in other words should be regarded as an equitable apportionment * * the duty of making it is cast up in the corporation, and it ought to be presumed that the defendant has performed its duty instead of presuming that it has failed to do so." [1]

The respondent in the case at bar has availed himself of this and the other language of the Court

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[1] Page 432.

in that case,[1] and *has overcome the presumption* by charging fraud and wrongful failure to apportion.

This view has been fully adopted by the Circuit Court of Appeals in this case,[2] and it is waste of time to discuss it further.

(b) *Again the present suit is an omnibus, class suit—which seeks to compel an equitable apportionment based upon the rights of the different classes of policyholders.*

It is a suit in which the judgment will *be binding upon all*—and it will constitute a definite and final result which will be for all times acquiesced in.

All of the arguments of *ab inconvenienti* which have been used for fifty years to keep the policyholders from ascertaining the basis of apportionment and which are again resorted to for the purpose of raising up ghosts to scare justice from her base, now become mere idle talk.[3]

(c) *In the Greeff case the Court of Appeals again laid stress upon the fact that there were no charges of fraud or wrongdoing*[4] *and particularly alluded to the fact that there were no tables or data in the bill which enabled it to say whether or no the apportionment was inequitable.*[5]

Moreover the Greeff case was dismissed as an *equity* suit by virtue of the 56 Section of the Insurance Law, which forbids such action of accounting

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[1] See ante, page 3.
[2] Record, page 104.
[3] Bitterman vs. L. & N. R. R. Co., 207 U. S., 205, at page 225. U. S. vs. Bitter Root Development Co., 200 U. S., 451, at page 479.
[4] Ante, page 4.
[5] Ante, page 54.

without the consent of the Attorney General—which law is now repealed.

II. *Where a litigant invokes the doctrine that the Federal Courts are bound by the decisions of the State Courts, he must show that such decisions cover the very point and principle involved; he must show that the State Court passed upon facts in substance similar to the facts existing in the case in which he invokes the judicial estoppel.*

In form, in substance, in facts, the case at bar is as different from the Uhlman and the Greeff cases as coal is to snow. If counsel can make snow out of coal, they may perhaps make the Greeff and Uhlman cases apply here.

III. *The point involved is the general nature of the contract between the parties.*

(a) *It does not depend upon the question of the corporation's power—it is conceded that it has power to make the contract contended for by the respondent—but the point is what is the character of the relationship established by the contract.*

The cases cited by the Petitioner are, therefore, inapplicable. This exact point is involved in Carpenter vs. Providence etc. Ins. Co.,[1] where Story, J., held, that

> "The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or custom."

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[1] 16 Peters, at page 511.

(b) *There can be no better test as to whether a given case is a precedent than to inquire or ascertain if it would be followed by the same Court that made it, and would hold it decisive of the case at bar*

If the New York State Courts would not recognize these decisions as controlling the case at bar, certainly they will not be so treated by the Federal Tribunals.

In view of the broad and clear distinction made in the Uhlman and Greeff cases between cases alleging fraud and wrongdoing and those which do not, the New York Courts certainly would not follow them in this case. They would be bound to hold that the present case comes within the exception made in those two cases, and showed an entire dissimilarity of facts and forms of action from those disclosed in Uhlman & Greeff cases.

(c) *Moreover no matter which way the subject is looked at—even accepting the views expressed in the brief of Petitioner that the State Courts have construed a State Statute and as a result a certain line of policy for the government of insurance corporations has been laid down—the Legislature has expressly overruled these decisions, and it now*

1st. Allows the policyholders to sue for an accounting;

2nd. And has declared by the 86th Section all of the assets of insurance companies to belong to policyholders.

The Legislature has now inaugurated a new policy and established a new line, which the Supreme Court of the U. S. will follow as the last rule of the State upon the given subject.

IV. *But even if the Uhlman and Greeff cases decided flatly that a policyholder was remediless in a*

Court of Equity to stop the destruction or waste of his property by the robbery of the insurance company having it in charge; even if a State Court did flatly hold that he could be openly cheated out of his surplus by a dishonest or inequitable apportionment, still the Federal Courts would not be bound to follow the decision.

(a) *The Judiciary Act of* 1789[1] *is as follows*:

> "The laws of the several States except where the Constitution * * * * otherwise require * * shall be regarded as rules of decision **in trials at common law** in the Courts of the United States, *in cases where they apply.*"
>
> "The equity jurisdiction of the Courts of the United States is subject to neither limitation nor restraint by the State authorities, and is uniform throughout the different States of the Union." [2]

If these decisions of Uhlman and Greeff had the full effect claimed for them in the Federal Court,

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[1] Now incorporated into Sec. 721 of the R. S. U. S.

[2] In Gamewell Fire-Alarm Tel. Co. vs. The Mayor, etc. (31 F. R., 312, 313), the Court by Wallace, J.: Hull vs. Dills, 19 Fed. Rep., 657, 658, 659; Hyde vs. Stone, 20 How., 170, 175; Union Bank vs. Jolly's Administrators, 18 How., 507; Suydman vs. Broadnax, 14 Pet., 74; Railway Co. vs. Whitton, 13 Wall., 285, 286; Payne vs. Hook, 7 Wall., 429, 430; Bank of North America vs. Barling, 44 Fed., 641; Union Trust Co. vs. Rochester & P. R. Co., 29 Fed., 609, 610; Smith vs. Railroad Co., 99 U. S., 399, 401; Fitch vs. Creighlin, 24 How., 159, 162; Clark vs. Smith, 13 Pet., 195, 203; Wotherspoon vs. Mass. Den. Ass'n., 38 Fed. Rep., 625, 626; Edwards vs. Conn Mutual Life Ins. Co., 20 F. R., 452, 453; Wills vs. Pauly, 51 F. R., 257; Goldsmith vs. Gilland, *et al.*, 22 F. R., 856, 866; Case of Broderick's Will, 21 Wall., 503, 520; Watts vs. Camors, 115 U. S., 353, 362; Nickerson vs. Atchison, 30 F. R., 85, 86; The Lottawanna, 21 Wall., 558, 576; Cook vs. Cook, 34 F. R., 249; Boyle vs. Zacharie, 6 Pet., 647, 657; Hale vs. Tyler, 115 F. R., 833, 835; Schmidt vs. West, 104 F. R., 272, 274.

it is easy to see that any State could deprive the latter entirely of its jurisidction.

It will be conceded that these decisions were rendered *after* the contract was made between the petitioner and respondent. If it is argued that the decisions affect a *right,* then they would operate as an impairment of a contract and would be against the Federal Constitution.

From the language of the Petitioner's brief it is not claimed that the cases of Uhlman and Greeff are controlling except upon those policyholders whose insurance was effected *subsequently* to their rendition.

It is then clear that they are not binding upon the respondent whose rights were fixed long prior to these adjudications.

The Petitioner's policy of insurance was dated January 12, 1876.[1] The decision in the Greeff case[2] was made in 1899; in the Uhlman case[3] in 1888.

It is said in the Brief of Petitioner (page 34):

> "*Every person becoming a policyholder since the decision in the Uhlman and Greeff cases has had a right to rely upon and is bound by those decisions as part of the law of the State and therefore part of his contract. Every such person has presumably entered into his contract in the faith that it was the right and the duty of the Society's officers 'to retain surplus.' * * * If this Court were now to depart from those rulings it would obviously be impairing the obligation of the contract. * * * The thought of the anomaly and the injustice which*

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[1] Record, page 44.
[2] 160 N. Y., 15.
[3] 109 N. Y., 431.

would result if the Supreme Court should depart from the rulings of the New York Court of Appeals on this question **is appalling."**

The appeal of the Petitioners in the case at bar, for the maintenance in their entire integrity and force, of the cases of Greeff and Uhlman, would be quite touching if it were not for the disagreeable fact that this appeal has no foundation to rest upon. Both the facts and the law are against the attempted argument to support it, and the use of 16 pages of the Petitioner's Brief to this end is both misplaced and vain.

Respondent's policy was issued in 1876.

The Uhlman case was decided in 1888; the Greeff case in 1899.

Impairment of contract! Whose contract is impaired? The petitioners have unconsciously made the best argument that could be made in respondent's favor.

SIXTH.

There is no defect of parties defendant.

No claim is made in this bill against any officer or director of the defendant. The whole theory of the bill, so far as illegal acts and omissions on the part of officers is concerned, is that the defendant Society is responsible itself for such acts. The complainant passes over the heads of irresponsible agents, as he has the right to do, and is no more bound to make the negligent or corrupt official a party to the bill, than a plaintiff in a suit against a railroad company, would be bound to make the negligent motorman or engineer a party defendant.

In the case of Buford vs. Equitable Life, cited by the defendant in its brief[1]—a case decided under the statute of 1872—the Court not only declared that the defendant's officers were not necessary, but were improper parties, and mulcted the plaintiff in costs for bringing them into court.

Points VII, VIII and IX of the brief of the petitioner are based in their reasoning upon a complete misapprehension of the theory of the bill. There is no impossibility of applying a proper remedy; there is no defect of parties; there is no reason—in this suit—to join either officers or stockholders as parties.

Let us state the proposition simply:

(a) The defendant advertises that it will insure policyholders, and will for safety's sake charge for insurance much more than the cost of insurance, thus producing in all human probability a large surplus.

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[1] N. Y. Law Journal, Dec. 6, 1905, page 761; 98 N. Y. Supp., 152.

(b) It promises to apportion *all* of this surplus among the policyholders whose property contributes to it, keeping back *nothing* except legitimate expenses and a dividend of seven per cent. on its stock.

(c) It incorporates these agreements in its charter and in the policy written and delivered to the insurer.

Then it violates the obligations thus assumed:

(1) By fraudulently mismanaging the funds placed in its hands so as to divert to its officers and directors profits which it should have earned for and apportioned among the policyholders.

(2) Out of the balance of the surplus remaining after these frauds it commits depredations on its own account. It withholds from its policyholders a little here and a little there until it has accumulated $10,000,000, which it claims for itself as against its policyholders. By this claim it gives to its stock the enormous value shown by the sales referred to in the Bill. It is repulsive to think of the course of petty larceny which has built up this total which the Society has "saved" for itself by cheating this widow out a little of her share of the surplus—by taking a little more from that orphan—by failing to give a proper credit in reduction of premiums to such policyholders as the complainant who elected to allow his share of the surplus to be applied to make easier—as his age increased and his earning power lessened—the task of providing for his family.

Now the existence of this sum of $10,000,000—claimed to be *owned* by the Society—disposes of many questions. *First*, it is the Society that claims to own it, and not the officers or stockholders; and

the policyholder who questions this claim has his quarrel with the Society alone. And this notwithstanding the scramble among the stockholders to get possession of it. *Second,* the existence of this claim on the part of the defendant negatives absolutely the proposition that this is merely a case where a policyholder is seeking to interfere with the honest discretion of the defendant in managing the fund entrusted to its hands by the insurers.[1]

In the face of these facts how can our adversaries argue under their point VII that no decree can be rendered in this case? The court can direct that this fund of $10,000,000 be taken from the defendant and restored to the policyholders to whom it belongs. And if a judgment is rendered against the Society for more than it can pay it will not be the first corporation which has found itself with judgment debts in excess of its assets. It will disappear in bankruptcy—unless its stockholders make up the deficit. And thus will be accomplished what the Superintendent of Insurance of New York says should be the aim of all, viz.: *the elimination of stock control and Wall Street control of the Equitable.* It will become a mutual company in fact; its assets will pass into the hands of the policyholders who own them.

We shall not pause to argue the proposition, advanced in point VIII of the brief of our opponents that the stockholders of the defendant are necessary parties. Why? Why may not a corporation be sued to compel restoration of diverted trust funds without joining all its stockholders?[2] Why should they be joined? Why may we not have a

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[1] See generally upon this subject U. S. Shipbuilding Co. vs. Conklin, 126 Fed. Rep., 132, which was a case where directors were not joined as parties defendant.

[2] Hawkins vs. Glenn, 131 U. S., 319.

decree giving us full relief against this corporation—perhaps removing it from the trust and appointing a receiver of the trust property—without knowing who the stockholders are?

And as to the necessity of joining delinquent officers and directors the case seems equally clear.[1] The bill charges wrongs committed by responsible officers of the defendant only for the purpose of making the defendant answer for these wrongs. If any of them prove to be unauthorized the defendant will not be responsible for them. No relief is asked against officers or directors. But this corporation can act only through individuals, and the rule requiring the statement of facts and not conclusions—so vigorously asserted by our adversary—required the mention of their various acts of misconduct in order to state a case against the defendant itself.

Much of the argument under point IX is, we think irrelevant. This case comes up on demurrer. There is no question here of harsh or inequitable remedy—of costly accounting—of the nightmare of suits by other policyholders. All of these things may safely be left to the court below. Does this bill state a case? That is the sole question. May this defendant be sued to redress these wrongs done to a great class of people?

Finally, it appears that within the last few years full light has been thrown upon the relation between an insured and a life insurance company. A quarrel between Hyde and Alexander in this Assurance Society led to legislative and judicial investi-

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[1] Colonial, &c. Co. vs. Hutchinson, &c. Co., 44 Fed. Rep., 219, 223.

gation which revealed a condition of affairs in all of the large life insurance companies of New York, that showed well laid and systematic plans of fraud, misappropriation, waste and mismanagement of the most sweeping and painful character.

Before these disclosures, brought about by this unexpected disruption of friendly and official relations, all attempts by the policyholders to learn anything about the management of these companies had been repulsed by judicial or legislative barriers.

The Societies indignantly denied the right of policyholders to question the efficiency or honesty of their officials. They appealed to the Courts to prevent investigation of their actions or accounts on the ground of *ab inconvenienti*; that the business would be jeopardized and damaged if policyholders were encouraged to pry into their methods.

The curtain was at length raised by accident and the community saw that it must be emphatically and sternly announced that Life Insurance was a great and sacred public trust, and that whatever dicta had theretofore been laid down by the Courts, by which the doors to investigation were closed, in the light of present experience must be corrected.

Public sentiment operating upon legislation in New York quickly reversed all preceding history and announced a policy of proper investigation, stamped the business of life insurance as a trust and proclaimed that all of the property acquired by the funds of the insured belonged to them.

The Equitable Assurance Society is in Court in this case acknowledging by its demurrer all of the facts alleged, and such inferences as can be fairly drawn from them. There can be no doubt under the law as laid down in the Greeff case[1] as to what is before the Court on demurrer.

[1] 160 N. Y., p. 19 at p. 29.

The Bill in this case, as the Circuit Court of Appeals said, is replete with detailed allegations of fraud, waste and wrongdoing. It is not the case of an ordinary demurrer, where a mere formal, technical admission is involved, for the Bill is based upon the reports of the Society's own officials and of the sworn officers of the State of New York—and cannot be truthfully controverted.

As was held by this Court in Pollock vs. Farmer's Loan & Trust Co.:[1]

> "The jursidiction of a Court of Equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital and profits has been frequently sustained."

The relief demanded is fully justified by the facts set forth in the Bill, which may be summed up as follows:

The Bill charges

> 1st. That the Company failed to apportion the net surplus as ascertained by it.
>
> 2nd. That it wrongfully appropriated a large portion of the surplus, viz.: $10,000,000, to its stockholders.
>
> 3rd. It charges fraud, mismanagement and waste, and decimation of the corpus of the property.
>
> 4th. It charges that the surplus was accumulated and appropriated for the illegal and fraudulent purpose of allowing the Trustees to speculate with it for their own gain or benefit.

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[1] 157 U. S., 429, at page 553.

If it is immune from accountability, it takes no prophet to foretell what the result will be. The courts closed their doors to policyholders in the past, and the result is written in this record.

The case of Huber vs. Martin,[1] the Court, in disposing of a demurrer to a complaint, as in the case at bar, said:[2]

> "The very statement of the position which must be maintained in order to defeat the complaint as insufficient to show any wrongdoing as regards the appellant, of which he can be judicially held to complain, in the manner attempted, or at all, at first sight, we must confess, so shocks the moral sense that one is inclined to enter upon a study of the subject with the impression that no substantial basis can be found for it in the law. As a rule one can rightly acquire property only by gift, *inter partes,* or operation of law, or by finding or legitimate reduction to possession of things belonging to the people in the sovereign capacity, or by estoppel, or by adverse possession, or by creating it by one's own energy, or that in connection with his private capital, or such and the capital of others legitimately secured or by purchase. To obtain property in any other way, one must needs pass beyond the boundary line between right and wrong, measured by legal standards. It is quite probable that there have been many excursions beyond that line, and many more beyond the line dividing right from wrong tested by purely moral standards, in the ad

[1] 127 Wis., 412.
[2] Pages 420 and 423.

ministration of insurance trusts of different sorts, some of the kind involved here, and some having the stock feature of ownership, the officers, or those connected with them, with their connivance or consent, or both, in various ways depleting the trust fund, or using it for their private enrichment, as never contemplated by the policyholders, or the organic acts of the corporate creation. Such occurrences, whether viewed in their moral or legal aspects, as regards facility for transferring trust property to the private use of its chosen guardians, pale before the possible happenings if the stated case must be stamped with judicial approval. In that contingency, nothing stands in the way but the uncertain will of the legislator, of the officers of our great Mutual Life Insurance Company, if they should be so inclined, so manipulating things as in time to reduce to their private ownership the great wealth constituting its surplus fund, and reducing to like ownership, the goodwill of the insurance business itself, which has been built up by wise management, and the patronage of the people, through a period of more than half a century. The very thought that such a result would be possible, if the law is as contended for by respondent's counsel, suggests the existence of such serious infirmity in our constitutional guarantees as regards property rights, that one could not well conclude that they exist, except in the face of some unmistakable demonstration."

SEVENTH.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

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JOSEPH De F. JUNKIN,
GEORGE GORDON BATTLE,
H. SNOWDEN MARSHALL,
Of Counsel for Respondent.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* BROWN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 74. Argued January 13, 14, 1909.—Decided March 1, 1909.

A life insurance company which has several hundred thousand policyholders is in its nature a public institution, and where there is no apprehension as to its solvency, a court of equity will consider all the facts as to the relative advantages and disadvantages of a receivership or accounting before granting relief of that nature in the suit of an individual policyholder even if jurisdiction to grant such relief exists.

The fact that stockholders claim the surplus of an insurance company and the officers of the company do not actively deny the claim gives no ground for a receivership at the suit of a policyholder claiming that the surplus belongs to the policyholders.

A demurrer only admits facts well pleaded in the pleading demurred to; it does not admit the pleader's conclusions of law or the correctness of his opinions as to future results.

The construction of a general act and a charter granted thereunder pertain to the state court just as if the charter were granted by a special act; and in a suit by the holder of a policy, executed at the home office, the meaning and construction of the charter as held by the state court will be binding on the Federal courts, and, in the absence of any Federal question, the construction of the contract by the state court will be of most persuasive influence even if not of binding force.

The wrongdoing of former officers of an insurance company, and their continuance in power, in the absence of any trust relation, gives no jurisdiction for an accounting in equity in a suit in which the company is the only defendant as between a simple debtor and creditor.

The Equitable Life Assurance Society is not a trustee of its policyholders under its charter and policies as the same have been construed by the highest courts of the State of New York.

As the charter and contract have been construed by the highest court of New York, a policyholder in the Equitable Life Assurance Society can only participate in the surplus of the society according to the terms of the policy; and a discretion rests with the officers of the society as to what amount of surplus shall be retained and distributed, and when the distribution shall be made.

While wrongdoing, waste, and misapplication of funds reducing the surplus of an insurance company before distribution, might give ground of action to a policyholder, it would not necessarily, where there is no allegation of insolvency, give ground for equitable action.

Where the bill avers solvency of defendant at present, a prediction of insolvency in the future on account of inability to meet claims of policyholders by reason of mismanagement is a mere conclusion of law and not a fact which is admitted by demurrer or on which a court can grant equitable relief.

Where a suit for accounting by a policyholder against an insurance company as sole defendant avers that the stockholders claim to own the surplus, no decree can be made as to such ownership without the presence of the stockholders as parties.

Equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of

law, and where, so far as necessary, discovery may be obtained as well as in equity. Rev. Stat., § 724; *United States* v. *Bitter Root Co.*, 200 U. S. 451.

A complainant who can obtain all the relief to which he is entitled in a single suit cannot invoke the interference of a court of equity on the ground that defendant may be saved a multiplicity of suits against it by others situated similarly to himself.

151 Fed. Rep. 1, reversed.

THIS case comes here on writ of certiorari, which brings up the record from the Circuit Court of Appeals for the Second Circuit, reversing the decree of the Circuit Court for the Southern District of New York, which sustained the petitioner's demurrer to the plaintiff's bill and dismissed the same. The opinion of the Circuit Court is reported in 142 Fed. Rep. 835, and that of the Circuit Court of Appeals, 151 Fed. Rep. 1.

The bill was filed against the defendant (the petitioner above named) some time in August, 1905, and is one of extreme length, and makes allegations in great detail relating to the conduct of the business of the defendant by its board of directors and by its officers and agents for many years prior to the filing of the bill. It will not be necessary to repeat all of them in order to understand the case as made. The following facts, among many others of a similar nature, appear in the bill:

The complainant is a citizen of the State of Maryland and brings this suit in behalf of himself, as well as all the policyholders and annuitants of the company defendant, who may choose to come in and join therein; the defendant is a citizen of the State of New York and an inhabitant of the Southern District thereof.

The defendant was incorporated in May, 1859, under a general law of the State of New York, passed June 24, 1853, providing for the incorporation of life and health insurance companies. In accordance with this act there was filed by the incorporators a declaration, in the nature of a charter, from which it appears that the capital of the defendant was $100,000 in cash, divided into 1,000 shares of $100 each, and the corpo-

rate powers of the company were vested in a board of directors. The insurance business was to be conducted upon the mutual plan. The holders of the capital stock were, by the declaration, to have the right "to receive a semi-annual dividend on the stock so held by them, not to exceed three and one-half per cent of the same; such dividends to be paid at the times and in the manner designated by said directors of the company. The earnings and receipts of said company, over and above the dividends, losses and expenses, shall be accumulated."

The officers were to strike a balance every five years from December 31, 1859, which was to exhibit its assets and liabilities and also the net surplus, after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policyholder was to be credited with an equitable share of the surplus, which was to be applied to the purchase of an additional amount of insurance for each policyholder, or, if any policyholder should so direct, such equitable share of the surplus should be applied in his case to the purchase of an annuity.

The complainant took out a policy in the company on the twenty-eighth of December, 1867, for $25,000, in the form of an ordinary life policy, which was subsequently, and on the twelfth of January, 1876, changed to another ordinary life policy, payable to his wife upon his death, and if his wife were not then living, then to the children of complainant, and if there were no children, then to the complainant's executors, administrators or assigns. The policy was also issued and accepted upon certain conditions printed on its back, which were accepted as a part of the contract, among which provisions is the following:

"6. This policy, during its continuance, shall be entitled to participate in the distribution of the surplus of this society, by way of increase to the amount insured, according to such principles and methods as may, from time to time, be adopted by this society for such distribution, which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract, but the society may, at any time before a forfeiture, upon the request

of the person holding the absolute legal title to this policy, substitute a cash payment, to be fixed by said society, in lieu of the said increase to the amount insured, and such payment may be made by reduction of subsequent premiums, if said policyholders shall so elect."

The complainant elected to receive his share of the surplus, as ascertained from time to time, in the reduction of the premium, and the company was notified of that election and ratified and accepted the same, and since the date of the issuing of the policy the complainant has regularly paid the premiums thereon as they severally accrued, after deducting the sums which at each period the officers of the defendant stated to be the entire amount applicable in reduction of the premiums as complainant's equitable share in the surplus. Although the complainant has been entitled to have his full share of the lawfully ascertained and true surplus profits of the defendant applied in reduction of his premium, yet the amounts allowed by the officers of the defendant in reduction of his premium have not been the real amounts of complainant's equitable share in the true surplus, but by means of the abuse of discretion, wrongs, and the inequitable and fraudulent conduct of the defendant, its officers and agents, the company, its officers and stockholders, have wrongfully retained and to the extent of a large sum, fraudulently wasted and misappropriated to themselves a large portion of complainant's share in said surplus; that he has accepted such reductions of premium as have been from time to time assigned to him solely because of his belief that the officers of the defendant were acting in a just and lawful manner, and in reliance upon the representations of the officers of the defendant thereto, stating that he was receiving his lawful share of the true surplus, which representations were untrue and fraudulent and without knowledge by complainant that they were untrue, or of the facts thereafter stated in the bill.

The defendant has, at the expiration of each year since the defendant's incorporation, ascertained and entered upon its books a sum alleged to be the "net surplus" earned by the

defendant during the preceding year, which surplus has been reported annually for many years to the insurance department of the State of New York as the fund which belonged to the policyholders exclusively, and one in which the stockholders were without any interest whatever, while on the other hand the defendant now claims that such surplus belongs to its stockholders.

The defendant, through its officers, has been crediting and paying to its policyholders, from time to time, only a portion of the surplus admitted to exist by the defendant, and to the whole amount of which complainant and the other policyholders are entitled in equitable proportion, and the officers, contrary to the rights of the policyholders and in fraud of their rights, have not credited the policyholders with their equitable share of the surplus, although such surplus has been duly ascertained from their books, nor have they paid policyholders whose policies matured from time to time their just and equitable share of such surplus to which they were entitled, and the stockholders now claim and threaten to appropriate all the surplus as a dividend, or earning, upon the shares of stock of the company, in direct disregard of the representations made by the defendant to the superintendent of insurance of the State and in disregard of the rights of the policyholders.

From the books it appears that there were in 1904 over 500,000 policyholders; over $1,495,000,000 of insurance risks; over $413,000,000 of assets; liabilities over $333,000,000, and a surplus of over $80,000,000. That there are over $10,000,000 of the surplus in which the stockholders can have no interest and which are still claimed by them. The retention of the surplus has been wrongful and for the fraudulent purpose to pile up a fund under the control of the defendant and its officers, by the use of which they could secure illegal and personal gain, and out of which they could distribute large sums to and among themselves under pretense of payment of salaries and expenses, by improper and extravagant disbursements, and

that in fact they have distributed to themselves improper and extravagant salaries, commissions and expenses from the fund or surplus which belonged to the policyholders. Great waste and extravagance are alleged to have been committed by the defendant through its officers in many ways. The officers of defendant have failed to properly invest and reinvest the funds of the company, but have willfully and negligently misappropriated and fraudulently mismanaged them.

About January, 1905, dissensions among the officers and board of directors occurred, and in consequence a committee of the defendant was appointed for the purpose of investigating its affairs and condition, and the superintendent of insurance also conducted an investigation, and the results showed the facts above stated in very great detail. A committee of the legislature also investigated the condition of the defendant during the fall of 1905 and reported to the legislature in 1906, showing the same facts.

Mr. Thomas F. Ryan in the meantime had become the owner of 502 shares of the stock of the defendant (a majority thereof), with a par value of $50,200, which were purchased by him for $2,500,000, and thereupon he executed a deed of trust to three trustees, with power to vote the stock as stated in the deed, and since that time Ryan has been the managing spirit in the defendant. Twenty directors have been elected to fill vacancies in the board of directors and are serving thereon, but the right to do so is denied by the complainant and the minority stockholders, and until such questions are settled by the determination of a court of final jurisdiction there does and will exist absolute confusion and corporate anarchy in the management of the affairs of the defendant.

If properly conducted the defendant has sufficient assets to provide for and liquidate every outstanding policy and to insure the performance of every contract made by the defendant with its annuitants. It is subsequently averred that the defendant is insolvent, because it is responsible to the policyholders for the excessive sums paid in the way of salaries and

fees, and also for all sums of money lost consequent upon fraud and waste, and such amounts are said to be more than the defendant will have funds to meet when proved and demanded. (This, by way of opinion and prediction.)

The defendant is still in the control of the stockholders, whose representatives have been guilty of misappropriation and its business is at a standstill. The interests of the policyholders are to place the assets in the hands of a receiver, in order to wind up the affairs of the defendant, which is the only way to safeguard the policyholders' interests. An action at law is inadequate to afford proper relief and there would result, if such actions were necessary, a multiplicity of suits.

As relief, the bill prayed for the production of all books, papers and records of the defendant, and that an accounting be had of all the dealings and transactions of the defendant, its officers and agents and stockholders, from the commencement of the business of the defendant in 1859, or for such period as the court might deem proper. Also, that a trust be adjudged and declared to exist and imposed upon the assurance funds and surplus, as ascertained, as against the defendant, its officers and stockholders, and that it be adjudged that they, and each of them, hold the same as trustees for such persons as shall be declared to have interests therein under the decree to be entered in the cause. Such accounting should also be taken for the purpose of ascertaining to what extent the defendant is indebted to the surplus fund on account of damage, loss and depletion occasioned by the negligence, misconduct, misappropriation and other causes averred in the bill. Also, that it be adjudged that the defendant pay into such assurance fund the amount ascertained on such accounting to be due from the defendant, to such fund, and that the defendant, its directors, officers and agents, be enjoined from further retaining the control of or spending in any way the said funds received from the policyholders and annuitants, and constituting the assurance fund and the so-called surplus of the company, and also from doing any other act or thing in

connection with the funds of the defendant, except to transfer the same to a receiver, and that a receiver be appointed to take possession of all the funds held by the defendant, of every character and description, and administer and distribute the same, as he may be directed by the court.

The defendant demurred to this bill (1) for want of equity; (2) complainant had an adequate remedy at law; (3) complainant, under the laws of New York, had not legal capacity to sue; (4) complainant had no interest in the subject matter of the bill. Other grounds were stated not specially material now to notice.

Mr. William B. Hornblower, with whom *Mr. Allan McCulloh* was on the brief, for petitioner:

A demurrer does not admit the correctness of conclusions of law. *Hollis* v. *Richardson*, 13 Gray, 392; *Cragin* v. *Lovell*, 109 U. S. 199.

A fact impossible in law cannot be admitted by a demurrer. *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville R. R.* v. *Palmes*, 109 U. S. 253; *Gould* v. *Evansville &c. R. R. Co.*, 91 U. S. 536.

Where written instruments are set forth and annexed to the complaint a demurrer does not admit the construction placed by the pleader upon such instruments, nor conclusions or inferences drawn by the pleader therefrom. It is for the court to decide whether the construction placed by the pleader upon the instruments, or the conclusions or inferences of the pleader are correct. *Bonnell* v. *Griswold*, 68 N. Y. 294; *Buffalo Catholic Inst.* v. *Bitter*, 87 N. Y. 250; *Bogardus* v. *N. Y. Life Ins. Co.*, 101 N. Y. 337; *Greeff* v. *Equitable Life Assurance Soc.*, 160 N. Y. 19.

Matters of fact well pleaded are admitted by a demurrer, but it is equally well settled that mere conclusions of law are not admitted by such a proceeding. *Dillon* v. *Barnard*, 21 Wall. 430; *Interstate Land Co.* v. *Maxwell Land Co.*, 139 U. S. 577, 578; *Ford* v. *Peering*, 1 Ves. Ch. 71; *Lea* v. *Robeson*, 12

Gray (Mass.), 280; *Redmond* v. *Dickerson*, 1 Stockt. (N. J.) 507; *Murray* v. *Clarendon*, Law Rep. 9 Eq. 17; *Nesbitt* v. *Berridge*, 8 Law Times, N. S., 76; Story, Eq. Plead. (7th ed.), § 452.

Nor does a demurrer admit matters of inference or argument, or the alleged construction of an instrument when the instrument itself is set forth in the record, in cases where the construction assumed is repugnant to the language of the instrument. *Peckham* v. *Drake*, 9 Mees. & W. 78; *Humble* v. *Hunter*, 12 Law Rep. Q. B. 315; *McArdle* v. *The Irish Iodine Company*, 15 Irish C. L. 146; *Sprigg* v. *Bank of Mount Pleasant*, 14 Pet. 201; *United States* v. *Ames*, 99 U. S. 45; *Finney* v. *Guy*, 189 U. S. 343.

As to recitals, statements of what the papers which are made exhibits purport to show, and conclusions of law, the rule is well settled that only matters of fact well pleaded are admitted by a demurrer, while conclusions of law are not. *United States* v. *Ames*, 99 U. S. 35, 45; *Interstate Land Co.* v. *Maxwell Land Grant Co.*, 139 U. S. 569, 578; *Chicot County* v. *Sherwood*, 148 U. S. 536.

The authorities cited also sustain the propositions that opinions of the pleader as to the propriety of defendant's conduct or as to what is or is not the probable consequence of such conduct are not admitted by a demurrer and are of no probative value; also that general allegations of fraudulent or negligent conduct, or wrongful intent are to be disregarded upon demurrer, unless facts are alleged sufficient to substantiate the allegations.

Whether it be a charge of omission or commission the facts are not alleged, and a mere charge of negligence whether of omission or commission is charging a legal conclusion which is not admitted by the demurrer. *Knowles* v. *New York*, 176 N. Y. 430; *Talcott* v. *Buffalo*, 125 N. Y. 280; *Thomas* v. *N. Y. & G. L. R. Co.*, 139 N. Y. 163, 182; *O'Brien* v. *Fitzgerald*, 6 App. Div. 509, 513; *Franklin Fire Ins. Co.* v. *Jenkins*, 3 Wend. 130; *Van Schaick* v. *Winne*, 16 Barb. 89; *Kranz* v. *Lewis*, 115

App. Div. 106; 88 N. Y. 579; *People* v. *Equitable Life Ass. Soc.*, 124 N. Y. App. Div. 732.

Allegations of fraud, unsupported by facts fairly tending to sustain the charge, are insufficient. *Schiefer* v. *Freygarg*, 125 N. Y. App. Div. 498.

This society, being a corporation of the State of New York, organized under the laws of New York, the decisions of the highest court of that State, construing its charter and determining the rights of policyholders under the charter and under the laws of the State, will be followed by this court as authoritative and indeed conclusive where no question arising under the statutes or Constitution of the United States is involved. Rev. Stat., § 721; *Elmendorf* v. *Taylor*, 10 Wheat. 153, 159; *United States* v. *Morrison*, 4 Pet. 124, 137; *Green* v. *Neal*, 6 Pet. 291; *Wicomico Co.* v. *Bancroft*, 203 U. S. 112, 118.

A charter granted by special act to a corporation is simply a particular kind of statute. Therefore, the Federal courts hold themselves bound to follow the interpretation placed upon a corporation charter contained in an act of the legislature by the highest court of the State which enacted it. *Smith* v. *Kernochan*, 7 How. 198; *Stone* v. *Wisconsin*, 94 U. S. 181; *Cleveland, P. & A. R. Co.* v. *Franklin Canal Co.*, 5 Fed. Cas. No. 2,890; *Venner* v. *Atchison, T. & S. F. R. Co.*, 28 Fed. Rep. 581, 582, 586; *New Orleans W. W. Co.* v. *Southern Brew. Co.*, 36 Fed. Rep. 833, 834, 836; *Stone* v. *Wisconsin*, 94 U. S. 181, 183; *Waterworks Co.* v. *Refinery Co.*, 35 La. Ann. 1111.

The same principle applies to the construction of "Articles of Incorporation" drawn up under a general statute authorizing the incorporation of certain classes of corporations.

The corporate rights and liabilities growing out of such articles are to be determined by the courts of the State under whose laws the corporation is organized. *Polk* v. *Mutual Reserve* (C. C. S. D., N. Y.); *Merrimac Mining Co.* v. *Levy*, 54 Pa. St. 227 *et seq.*; *Clark* v. *Turner*, 73 Georgia, 1; *First National Bank* v. *Converse*, 200 U. S. 425.

The United States courts have invariably followed the state

decisions on all questions concerning corporations, where no Federal question was involved. See 11 Cyc. 903–907. See also *Secombe* v. *Railroad Company*, 23 Wall. 108; *Hancock* v. *Louisville Railroad Co.*, 145 U. S. 409; *Park Bank* v. *Remsen*, 158 U. S. 337; *Sioux City Railroad Co.* v. *N. A. Trust Co.*, 173 U. S. 99; *Williams* v. *Gaylord*, 186 U. S. 157; *Schofield* v. *Goodrich Bros.*, 39 C. C. A. 76; *S. C.*, 98 Fed. Rep. 271.

The defendant is organized under the laws of New York. Every person who has joined it as a policyholder has entered into his contract upon the basis of the laws of New York, as limited only by the Constitution and statutes of the United States. Every person becoming a policyholder since the decisions in the *Uhlman Case*, 109 N. Y. 421, and in the *Greeff Case*, 160 N. Y. 19, has had a right to rely upon and is bound by those decisions as part of the law of the State and, therefore, part of his contract. Every such person has presumably entered into his contract in the faith that it was the right and the duty of the society's officers "to retain out of its surplus an amount sufficient to insure the security of its policyholders, in the future as well as at present, and to cover any contingencies that might arise or be fairly anticipated" (160 N. Y. 34), and subject to the ruling that the relations of a policyholder to the company are not those of *cestui que trust* and trustee, but simply that of creditor and debtor. 109 N. Y. 421.

So far as the bill in this suit is based upon any alleged failure to comply with its charter or contract obligations as to the distribution of its entire net surplus, the bill is clearly demurrable under the rulings of the Court of Appeals of New York in *Greeff* v. *Equitable Life Ass. So.*, 160 N. Y. 19.

So far as the bill is based upon the theory of a trust relationship between the policyholders and the society, it is at variance with the settled law of New York as laid down by a long and unbroken line of decisions, culminating in the Uhlman decision.

The relation between the parties arises solely from the contract by the terms of which their rights must be governed.

The insurance company is not a trustee for the insured, even in case of a tontine policy, much less in the case of an ordinary life policy, such as that held by complainant. If the terms of the contract are violated by the petitioner the remedy of the policyholder is by an action at law to recover damages for breach of contract. *Uhlman* v. *N. Y. Life Ins. Co.*, 109 N. Y. 421; *Everson* v. *Equitable Life*, 68 Fed. Rep. 258; aff'd, U. S. Cir. Ct. App., 71 Fed. Rep. 570; *Hunton* v. *Equitable Life*, 45 Fed. Rep. 661; *St. John* v. *American Mutual Life Ins. Co.*, 13 N. Y. 31; *Cohen* v. *Mutual Life Ins. Co.*, 50 N. Y. 610; *People* v. *Security Life Ins. Co.*, 78 N. Y. 114; *Taylor* v. *Charter Oak Life Ins. Co.*, 9 Daly, 489; aff'd, 8 Abb. N. C. 331; *Bewley* v. *Equitable Life*, 61 How. Pr. 344; *Buford* v. *Equitable Life*, 98 N. Y. Supp. 152; *Pierce* v. *Equitable Life*, 145 Massachusetts, 56; *Greeff* v. *Equitable Life*, 160 N. Y. 19.

The bill cannot be sustained as a bill for fraud because, so far as any fraud affecting complainant's rights is concerned, he has an adequate remedy at law. *Insurance Co.* v. *Bailey*, 13 Wall. 616, 623; *Buzard* v. *Houston*, 119 U. S. 347, 352; *London Guarantee Co., Ltd.*, v. *Doyle*, 130 Fed. Rep. 719; *United States* v. *Bitter Root Co.*, 200 U. S. 451.

Nor does the fact that the bill also seeks discovery and an accounting, make a case for jurisdiction in equity.

Discovery and accounting are no longer sufficient ground for equitable jurisdiction in aid of relief of a legal character. Rev. Stats., § 724; *Stafford* v. *Ensign Mfg. Co.*, 120 Fed. Rep. 480; see also cases *supra*.

So far as the bill is based upon mismanagement and waste of corporate assets by the directors and officers, the only cause of action set forth in the bill is one which should be brought in the name of and for the benefit of the society as a corporation and not in the name of or for the benefit of policyholders who are merely contract creditors and who have not obtained any lien on the assets by way of judgment or otherwise and who have no claim as *cestuis que trustent*, as is perfectly well settled by all the cases. *Graham* v. *Railroad Co.*, 102 U. S. 148.

Furthermore, it is manifestly impossible to decree an accounting in this suit based upon waste of the society's assets. If this bill is to be sustained either as a bill to recover assets wasted by the officers of the society, or as a bill for a receiver and to wind up the society, there is a clear defect of parties defendant and those officers should be joined. *Minnesota* v. *Northern Securities*, 184 U. S. 199, 235; *Christian* v. *Atlantic & N. C. R. R. Co.*, 133 U. S. 233, 241; *Gregory* v. *Stetson*, 133 U. S. 579, 586.

It is the duty of the courts, and particularly of courts of equity, to protect insurance companies from merely harassing and annoying litigations which can be of no substantial benefit to the policyholders.

A court of equity has the right and is bound to consider the relative advantages and disadvantages of granting equitable relief. *Trustees of Columbia College* v. *Thacher*, 87 N. Y. 317.

It withholds the remedies if the result would be unjust, but freely grants them to prevent injustice where the other courts are helpless. *McClure* v. *Leaycraft*, 183 N. Y. 36, 41; *New York* v. *Pine*, 185 U. S. 93; *Penryhn Slate Co.* v. *Granville El. L. & P. Co.*, 181 N. Y. 80; *Knoth* v. *Manhattan Ry. Co.*, 187 N. Y. 243.

Mr. John R. Dos Passos, with whom *Mr. Joseph De F. Junkin*, *Mr. George Gordon Battle* and *Mr. H. Snowden Marshall* were on the brief, for respondent:

A trust relation arose, *ab origine*, between the respondent and petitioner, as to the corpus of the property in the possession of the society; and the policy of insurance is in effect a deed of trust, when read in connection with the acts under which the society is incorporated, and its charter and rules. See act of June 24, 1853, chap. 555, Laws of New York, under which petitioner was incorporated; Insurance Laws, § 71. No other relation but that of trust can be evolved from the documents above cited.

An analysis of the relations which the society, its stock-

holders and the policyholders bear to each other shows that in equity and public policy, all of the property of the society save $100,000 is held by it as trustee for the benefit of the policyholders. It is in substance and in equity no different from any other individual or corporation trustee. The Equitable was incorporated to effect insurance upon the mutual plan.

It became the agent and trustee of all of the policyholders, into whose hands are committed the collection, investment and division of the money of the policyholders, all of which is stamped with an ineffaceable trust. It was not the money of the stockholders by which the business of the Equitable Company has been established. Their so-called capital has been under lock and key in the office of the comptroller.

The mutual life insurance business is a great public trust, and between a policyholder and a company created for the purpose of insuring his life there is the purest and completest fiduciary relationship, and these things being shown, all of the remedies which a court of equity furnishes for a violation of a trust, will naturally follow and be promptly and fully applied. *Charity Corporation* v. *Sutton*, 2 M. & K. R. 406; more fully in 9 Mod. R. 349; 28 Am. & Eng. Ency. of Law, p. 858; *Gifford* v. *Rising*, 51 Hun, 3.

The society held itself out as a mutual company. The organizers were at full liberty to start it as an absolute and unqualified stock company. They accepted the mutual plan—they advertised and represented the society as one conducted solely on the mutual plan for the benefit and protection of its policyholders. See *Mygatt* v. *New York Protection Ins. Co.*, 21 N. Y., 55.

This argument is strengthened by the attitude assumed by the Equitable Society itself. See *Lord* v. *Equitable Life Assurance Co.*, N. Y. Supreme Ct., 2d Div., Sp. Term, and Appellate Div., 94 N. Y. Supp. 65; *Greeff Case*, 160 N. Y. 19.

Under the allegations of the bill we find Mr. Ryan controls the society as the majority stockholder. He is in that position as the result of paying an enormous sum for the shares—either

because he believes he can realize the same from the assets, or because he believes the possession of the assets is equally valuable. This court should declare that the stockholders have no interest in the property of this society except a dividend of 7 per cent and a return of the $100,000.

Mr. Ryan makes an indirect and insidious attack upon the rights of the policyholders: the stockholders, on the other hand, in the Lord suit, claim everything in sight.

Apart from the foregoing, there was a distinct agreement to set aside a separate and definite fund for the stockholders which constitutes a lien in equity which will be enforced and protected.

Upon well-settled grounds of equity the surplus is notwithstanding a security for the benefit, and impressed with a lien in favor of, the insured, who have a clear right to an accounting, and to preserve the property covered by such lien from fraud, misappropriation, diminution, waste, or destruction, by the society. 3 Pomeroy, Equity Jurisprudence, 1235; *Walker* v. *Brown*, 165 U. S. 664; *Ketcham* v. *St. Louis*, 101 U. S. 306; *Legard* v. *Hodges*, 1 Ves. Jr. 478; *In re Strand Music Hall Co.*, 3 De G., J. & S. 147; 2 Story, Equity Jurisprudence, § 1231.

The Equitable Society, petitioner, is at least a trustee as to the surplus, and is to be held to strict accountability for its non-apportionment, waste or disappearance. See charter, Arts. III, IV & VI; Report of Frick Committee, p. 44; Hendrick Report, pp. 54, 55. See allegations of bill as to surplus.

The complainant fully shows that he is entitled to equitable relief upon the ground, first, of adverse claim by the society and its stockholders as to the title to the surplus, and, second, of fraudulent conduct in the management of the property and surplus in the hands of the company and its misappropriation and waste. See tenth and fourteenth paragraphs of the bill.

The bill shows that the defendant has been guilty of fraud, waste and gross mismanagement of the property of the policyholders. The different charges are set forth in the bill and are given in detail in the report of the Frick Committee and that of the Superintendent of Insurance, and it is not necessary to

marshal them under specific heads, as they are most prominently treated in the reports above referred to.

These facts fully justify quick and full relief and such a judgment as will render it clear that the assets held by this society belong to the policyholders.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

Even if a court of equity had jurisdiction in a case like this, it is yet proper to consider the history of the defendant subsequent to the filing of the bill by complainant, with reference to the results which might and probably would follow a decree of the court in accordance with the demand of the complainant. The corporation is one of the largest in the world with its more than half million policyholders, its outstanding risks of an amount almost impossible to appreciate, and with assets and liabilities and surplus, reaching into hundreds of millions of dollars in amount. The defendant is in its nature a public institution, and the interests of its policyholders are directly involved in any proceeding looking towards its winding up, and indirectly the interests of many hundreds of thousands of individuals connected with the policyholders as objects of their bounty. The result of a stopping of this institution and the winding up of its business because, although not in necessary consequence, of the flagrant wrongdoing of some of its former officers and directors, would be most disastrous to the great majority of the people interested in its affairs. Taking all the averments of the bill together, there is not any foundation for apprehension as to the entire solvency of defendant. To place the institution in the hands of a receiver, while it is paying promptly all its obligations and with undoubted resources to continue to pay them, and is daily engaged in taking new business, under other and different management, would be a premature and wholly unnecessary ending of the defendant, and one which it would be mild to characterize as

ruinous to the interests of hundreds of thousands of people, and really beneficial to none. The enormous and very likely necessary expenses connected with a receivership, its certain failure to give full satisfaction to all, and the very great delays that would accompany the granting of the relief asked, are strong reasons against granting it in the case of a defendant which is paying all its obligations as they are presented. In addition to all these objections, it has happened that since 1905 a new board of directors has been chosen, new officers placed in command and probably an entirely new policy adopted and followed. Although these last-mentioned facts have happened since the filing of the bill in 1905, nevertheless it is not improper to refer to them, as they only constitute a history of the defendant since that time. They are found in public documents in New York, filed and existing of record in its insurance department, and they are the sworn returns of the officers of the defendant made since the change in 1906. They may be referred to, not to contradict the averments of the bill, but to show the officers now in control of the management of the defendant, its present condition, and the fact that it is now in full operation and in the daily discharge of all its obligations as they are presented. The right to an accounting in equity and the winding up of the defendant under these circumstances would have to be most clearly made out before such relief would be granted. A court of equity is bound to consider these facts before it would grant relief of the nature demanded. Such a court takes all the facts into consideration and the relative advantages and disadvantages of granting a relief which lies largely in cases of this nature in the discretion of the court, even if it be assumed that jurisdiction to grant the relief existed at all.

Under these circumstances we proceed to inquire as to the jurisdiction of a court of equity in such a case as is presented by the bill. It might be here added that the history of the *Lord case*, which is referred to in the bill, is to be found in 57 N. Y. Miscell. Rep. 417, and on appeal in 126 App. Div. 907,

and a still further appeal is pending in the New York Court of Appeals. We do not regard the matter as material, as it only refers to the claims of the stockholders to own the entire surplus in the defendant, and to the alleged attitude of the defendant as to these matters, in not denying their claims. This gives no ground for equitable interference at the suit of a policyholder against the defendant of the nature herein demanded.

As the questions in this case arise upon the defendant's demurrer to the bill of the complainant, it is necessary to direct attention to the effect of a demurrer as an admission. We are not called upon to cite authorities for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill, as, for instance, in regard to the probable effect in the future of the continued control of the defendant by the interests existing therein up to 1906. Hence any construction placed by complainant upon the charter of the defendant and the insurance policy issued by the defendant to the complainant is not admitted, nor is the allegation of the ownership of the surplus by the policyholders as alleged by the complainant, nor any opinion which is expressed in the bill as to the ability of the defendant to continue business, nor is any other opinion as to future happenings admitted by the demurrer.

Before discussing the merits of the case it is also proper to first decide what force is to be given the decisions of the highest court of New York with reference to the construction of the charter of the defendant and the policy of insurance issued by it. *Greeff* v. *Equitable Life &c.*, 160 N. Y. 19. Although the charter was obtained under a general law of the State of New York relating to the incorporation of insurance companies, yet the construction to be given that act and the charter obtained in pursuance of it pertains to the state courts just as if the charter were granted by a special act of the legislature. Ever since its incorporation under the general law of the State of New York, in 1859, the defendant has always done business

and had its general home office and its legal residence and domicil in that State. The insurance policy owned by complainant appears on its face to have been executed in New York and there is no averment to the contrary. The decisions of the highest court of New York are therefore binding upon this court as to the meaning and effect of the charter of the defendant, and as it is a New York company and the contract is a New York contract, executed and to be carried out therein, its meaning and construction as held by the highest court of the State will be of most persuasive influence, even if not of binding force, in the absence of any Federal question arising in the case. There is no such question here. *Stone* v. *Wisconsin*, 94 U. S. 181, 183; *Park Bank* v. *Remsen*, 158 U. S. 337, 342; *Sioux City &c. Co.* v. *Trust Co.*, 173 U. S. 99. This principle has been so frequently decided that further reference to adjudged cases need not be made.

The suit is brought by complainant for himself, as well as all other policyholders and annuitants of the defendant who may choose to come in and join in the suit, and the company is the sole defendant. No officer of the company or stockholder therein, or any alleged debtor to the company is made a party, and consequently any averment of the continuance in power of the same persons in the board of directors or otherwise is immaterial as a reason for the bringing of the action by the complainant in his own behalf, etc., to recover debts due the defendant, which the defendant will not itself sue for. This is not an action of that nature and there are not present the necessary parties to maintain it if it were. The purpose of the averment is probably to sustain the application for a receiver, made necessary, as alleged, by the wrongdoing of some of the former officers of the defendant. That, however, gives no jurisdiction for an accounting in equity as between a simple debtor and creditor and in the absence of any trust relation between them. A mere creditor as such has no right to that remedy.

We come then to a careful analysis of the other averments

in the bill, and it is seen that it is largely founded upon the theory of the existence of a trust in favor of the policyholders, past and present of the defendant, as against the defendant, its officers and stockholders, and it is asked that they, and each of them, be decreed to hold the funds and surplus, as they may be ascertained, as trustees for such persons as shall be declared to have interests in such fund and surplus, under the decree of the court to be entered in the case. The complainant alleges that this so-called surplus of the defendant belongs entirely to the policyholders, after making certain deductions, and the defendant holds it, or, at any rate, a large portion of it, in trust for them, and that such is the proper construction of the charter and the policy, and he also avers that defendant has not distributed it from time to time to the policyholders as intended by the charter and the policy. The various allegations in regard to waste, mismanagement and improper investment and reinvestment of the funds of the defendant, and also the alleged fraudulent conduct of the officers guilty of such acts, do not show any inequitable or improper actual distribution of the fund as among the policyholders themselves. Although the effect of such conduct has plainly been to prevent the growth of the surplus to greater proportions than it has reached, there is still no averment anywhere in the bill that the amount of the surplus that was, in fact, distributed was not fairly and equitably distributed to each of the policyholders, according to the amount of his policy and in strict accordance with the rules and regulations theretofore adopted by the defendant for such distribution, which rules had been accepted by the complainant from time to time as such distribution was made. The fact, as alleged, that the amounts were paid to the complainant and accepted by him on the fraudulent representations of the officers that such amounts were all that were due, has no effect upon the question of the equitable and proper distribution of the fund that was, as a matter of fact, actually distributed. Nor does it give a cause of action of an equitable nature. These averments only show waste and mis-

appropriation of the moneys of the defendant before they ever reached the surplus fund and before any distribution of it was made. In other words, they aver facts of mismanagement of the funds and wrongdoing by others, upon which a cause of action might arise against the officers and stockholders, or other persons guilty of such acts of wrongdoing and waste, in favor of the company itself. They lay no foundation for the jurisdiction of a court of equity in such a case, unless it appears that the relation between the policyholder and the defendant is that the latter is the trustee of the former by reason of the trust relation between them resulting from the insurance policy. The complainant's contention, as above stated, that there is such a trust in the fund mentioned has never been regarded as the law in the State of New York (*Cohen* v. *New York Life Insurance Company*, 50 N. Y. 610; *People* v. *Security Life &c. Co.*, 78 N. Y. 114; *Bewley* v. *Equitable Life &c.*, 61 How. Pr. 344; *Uhlman* v. *New York Life Ins. Co.*, 109 N. Y. 421; and, to the same effect, *Greeff* v. *Equitable Life Assurance Society*, 160 N. Y. 19), nor anywhere else so far as any case has been cited on the subject.

In the *Uhlman case*, *supra*, the plaintiff was the owner of a policy known as a ten-year dividend system policy, otherwise a "tontine plan" policy, which, it was averred, gave to the holder a special title to the funds derived from the payment of premiums on the policies of that kind and in the particular class to which the policy belonged. The Court of Appeals of New York held that such claim was not well founded; "that it could not be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts as to him and in relation to any such fund in a fiduciary capacity. It has been held that the owner of a policy of insurance, even in a mutual company, was in no sense a partner of the corporation which issued the policy, and that the relation between the policyholder and the company was one of contract, measured by the terms of the policy." The holder of a policy of the nature of that referred to in the *Uhlman case* would be certainly as much entitled to claim that the company was a trustee for the holder as would be this

complainant. Indeed, the policyholder in the *Uhlman case* occupied a much stronger position for making the claim than does this complainant, who is the holder of an ordinary life policy, with rights to participate in the distribution of the surplus according to methods, etc., adopted by the defendant, as already mentioned. The claim was, however, denied by the state court, following the decisions of the New York courts for many years. To hold that a trust is proved in this case by virtue of the charter and policy of insurance is to hold contrary to the decisions of the highest court of the State of New York for a long number of years past without a single decision the other way in all that time.

We also think there is no ground for the contention on the part of the complainant that he, as a policyholder, had any right to an accounting, and to compel the distribution of the surplus fund in other manner or at any other time, or in any other amounts than that provided for in the contract of insurance. By that contract he was entitled to participate in the distribution of some part of the surplus, according to the principles and methods that might be adopted from time to time by the defendant for such distribution, which principles and methods were ratified and accepted by and for every person who should have or claim any interest under the policy. It has been held that under such a policy how much of the surplus shall be distributed to the policyholder and how much shall be held for the security of the defendant and its members is to be decided by the officers and management of the defendant in the exercise of their discretion to distribute, having in mind the present and future business, and, in the absence of any allegations of wrongdoing or mistake by them, their determination must be treated as proper, and their apportionment of the surplus is to be regarded *prima facie* as equitable. *Greeff* v. *Life Insurance Co.*, *supra*. The court further held that manifestly a discretion rests with the defendant in determining how much of the surplus should be distributed to the policyholders and how much should be retained for the security of the defendant and its members,

having in view the present and future contingencies of the business, and the court remarked that "there was no evidence or allegation that the plaintiff had been inequitably treated by the defendant as between himself and the other policyholders." The frauds and mismanagement mentioned did not in themselves give a policyholder any greater right to a distribution than is mentioned in the contract, and the right depended upon the judgment and discretion of the company as to time and amount.

Nor is there any possible reason for the appointment of a receiver and a real, though not formal, dissolution of the company and the distribution of all its assets, because the fund is not as large as it ought to have been, owing to the misconduct of the officers, and because the defendant has not distributed as much of the surplus as complainant thinks he is entitled to, because of such frauds and misconduct. It is contended, however, that the New York Court of Appeals has held that complainant is entitled to such relief as is demanded herein, and he cites as authority the *Uhlman case*, *supra*, and urges that provided it appear, by proper allegations (such as this bill contains) and proof, that frauds, misappropriation of the funds, etc., have been perpetrated by the officers or agents of the defendant, so as to prevent the proper accumulation of the surplus, the court will grant the relief demanded herein. We think that neither the *Uhlman* nor the *Greeff case* decides any such principle as is asserted by the complainant. After holding, as already stated, that there was no trust existing between a policyholder and even a purely mutual company, reference was made in the former case to the contention of the defendant that the apportionment made by it, or under its direction, was absolutely and, at all events, conclusive upon the policyholders, it was said in the opinion that that was not an accurate statement, and that the plaintiff and others similarly situated had the right, upon proper allegations, of showing that the apportionment made by the defendant was not equitable, or had been based upon erroneous principles, and he had the right to a trial and to make proof of

such allegations, and if true the court could declare the proper principles upon which the apportionment was to be made so as to become an equitable apportionment. The *Greeff case* simply adopted that statement in the course of the opinion, which is chiefly devoted to the discussion of other matters.

There is nothing in either case to show that any other wrongdoing or fraud was in contemplation of the court than that above mentioned, viz., that the proposed or actual distribution of the money as between the policyholders themselves was not equitable, or was based on erroneous principles.

Wrongdoing, waste, misapplication of funds and actions of that character, affecting the amount of the fund before distribution, were not held to furnish a ground of equitable jurisdiction for an accounting, and it was not held that even frauds in the distribution itself as between policyholders, or the adoption of wrong principles for such distribution, would be ground of jurisdiction in equity. That question was not before the court, and was not decided. It was simply stated that it would afford ground of action, not necessarily ground for equitable jurisdiction. However, this is no such case, as the language used shows was contemplated in the observations of the court in the *Uhlman case*.

So far as the averments in the bill go as to the purchase of the majority of the stock of the defendant by Mr. Ryan, and the execution by him of a deed of trust, we think those averments have no tendency to prove the existence of facts material to the cause of action attempted to be set forth in the bill.

There is no ground of jurisdiction in equity, either for the accounting prayed for or for the appointment of a receiver to wind up the affairs of the defendant on account of the alleged insolvency of the defendant. The complainant at first avers defendant's solvency, and that it is fully able to pay all demands from policyholders, and to perform every contract made by the defendant. The subsequent averment that the defendant is insolvent, because, as a conclusion of law asserted by the pleader, it is responsible to policyholders for excessive sums paid in the

way of salaries and fees, and also for sums of money lost consequent upon the fraud and waste of the directors or officers of the defendant, all of which are too large for the defendant to pay when demanded, is not admitted by the demurrer, and is not accurate as a conclusion of law. Whether such liability could be legally maintained or whether the defendant would be unable to pay the amount claimed from it when it was properly proved, and judgment duly recovered against it in an action for that purpose, is a mixture of a legal conclusion with a matter of opinion as to the future ability of the defendant to pay such liabilities. And the idea that the defendant itself is liable to policyholders for the frauds or wrongdoing set out in the bill and committed by its officers or members of its board of directors against the defendant and in their personal interests, we regard as without foundation. Such a kind of future possible insolvency furnishes not the slightest ground for present legal action adverse to the defendant. Very likely the defendant could itself maintain an action against those who have been guilty of fraudulent conduct towards it, resulting in financial loss to it, and, of course, those who are alleged to be guilty would have to be made parties. No case is therefore made for an accounting or for a receiver based upon these allegations of the bill. Certainly the court could not give any judgment that the policyholders are the owners of the so-called surplus. It may be that they are. The bill itself avers that the stockholders contend they are the owners of the surplus, or at least of some considerable part of it, and certainly no decree could be made on the subject of such ownership and against the claims of the stockholders, without their presence as parties.

If it be held that there is no trust, then it follows that the suit cannot be maintained in equity on the sole ground of fraud. Such a ground for the maintenance of the suit (even if complainant could otherwise maintain it) is a mere incident to the main ground set forth in the bill. Equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of law, and

where, so far as necessary, discovery may be obtained as well as in equity. Rev. Stat., § 724; *United States* v. *Bitter Root Co.*, 200 U. S. 451, and cases cited.

Complainant also claims jurisdiction in equity on the ground that such an action will prevent a multiplicity of suits. But this is not a case for the application of the doctrine. There can be no claim that the complainant is saved from a multiplicity of suits by the maintenance of this. A single action at law by him against the company would give him all the relief to which he might be entitled. If there are others similarly situated as to claims, they can themselves commence an action. The defendant is not in court asking it to take jurisdiction of its suit against others in order to prevent a multiplicity of suits against it or by it. It does not rest with complainant to urge as a foundation for his suit that the defendant may thereby be saved a multiplicity of suits by other parties when the defendant raises no objection to such possible suits and urges no such ground for jurisdiction in equity of the complainant's suit.

After a careful consideration of all the facts we are of opinion that no cause of action is alleged in the bill for an accounting or for the appointment of a receiver or for other equitable relief. The decree of the Circuit Court of Appeals is therefore

Reversed.

MR. JUSTICE DAY, not having heard the case, took no part in its decision.